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NO. 82-____

IN THE
Supreme Court of the United States

OCTOBER TERM, 1982

82-278

LESTER JACKSON,

Petitioner,

v.

WASHINGTON MONTHLY COMPANY, CHARLES PETERS AND JOHN ROTHCHILD,

Respondents.

-AND-

LESTER JACKSON,

Petitioner,

v.

WASHINGTON MONTHLY COMPANY, ET AL.,

Respondents,

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED

In Case 1, at a purely procedural hearing, after remand but **BEFORE** having summary judgment papers or any other evidence on the merits, the trial judge said, **on the record**, e.g.: (a) "there is nothing on God's earth worse than a pro se litigant" such as Jackson; (b) the case "should not [have been] brought" and Jackson's ex-lawyer was "suckered in"; (c) "the basic facts are not that much in dispute. They really aren't"; and (d) openly bitter at Jackson's prior appellate success, "there is no way I can keep him from [reopening the case], no way," simultaneously ordering respondents to move for summary judgment.

In Case 2, the judge *sua sponte* denied one time extension to *pro se* Jackson working alone (giving 15 days for immensely time-consuming tasks), but repeatedly let respondents' 35th largest U.S. law firm have all the time they wanted (months extra, thrice). Without requiring that need or relevance be shown, he allowed them (and indeed ordered *sua sponte*) carte blanche discovery (e.g., all litigative proceedings "involving" Jackson in 12 years, including parking tickets; 12 years' "all relevant" documents; tax returns; demands so broad as to include attorney work-product and attorney-client communications; and all of Jackson's unpublished writings be given the very defendants he sued for plagiarism). The Circuit Judges affirming this discovery called it "incredibly broad," seeking "everything under the sun," "not related" to the case, meant to "inundate" a *pro se* plaintiff, etc. Accordingly, the questions are:

I. Regarding conflicting Circuit interpretations and applications of the recusal statute, 28 U.S.C. §455 (1974):

A. Should this Court exercise its supervisory power, to conform practice to principle and make clear §455 *must* be enforced however distressing, when: (a) the record clearly documents a reasonable basis to doubt a federal trial judge's impartiality (if it does not in fact show overt personal bias); (b) a Circuit, with no stated reason, repeatedly fails to recuse the judge; (c) this conflicts with the Constitution, and *principles* of this Court and other circuits; (d) yet there was no specific governing Supreme Court precedent because, *in practice*, this Court has never (i) construed or applied §455, (ii) reversed a

federal judge in a *civil* case for failure to disquality, or (iii) reversed a federal judge in a criminal case since 1921 for actual or apparent bias under any recusal statute; and (e) Chief Judge Browning (9th Cir.), e.g., warns of a coming "destructive confrontation" on recusal due to "narrow interpretation" of §455?

B. Should the facts alleged to mandate recusal be assessed from the perspective of (1) the litigants, (2) the reasonable judge's superior insight, or (e) the average reasonable lay person on the street?

C. Under subsections (a), (b)(1) and (c), can a party involuntarily waive recusal by allegedly untimely action or by not using any other specific procedure?

II. Is "complete ignorance" prerequisite to exercise of the self-representation right, as strongly implied by the trial judge; and must a *pro se* litigant who is not "completely ignorant" appear before a judge who says "there is nothing on God's earth worse"?

III. Where two appellate panel judges condemned discovery as seeking "everything under the sun," "incredibly broad," and "not related" to the case; but such discovery was compelled *sua sponte* and affirmed with no showing of need or relevance; is this so in conflict with applicable decisions of this Court and the Circuits as to compel Supreme Court exercise of its supervisory powers?

IV. Did the lower courts so far depart from accepted and usual summary judgment practice as to call for Supreme Court supervision (e.g., by awarding, and affirming without stated reason, summary judgment to party using a pattern of deceit, including demonstrably false affidavit and altered evidence on summary judgment motion; denial of complaint amendment based on new facts in moving affidavits; failure to address any of seven opposing affidavits and other extensive opposing papers)?*

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*The parties in case 1 are Lester Jackson, The Washington Monthly Company, Charles Peters and John Rothchild. The same parties are in Case 2, with Taylor Branch, Anthony F. Essaye, John H.C. Barron, Jr., Roger A. Clark, John M. Liftin, Eugene T. Rossides, Stuart Rothman, Fred B. Smith and Robert V. McIntyre.

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ABBREVIATIONS

"Case 1": Court of Appeals No. 79-2264; Civil Action 749-72 (D.D.C.)

"Case 2": Court of Appeals No. 80-2135; Civil Action 79-1400 (D.D.C.)

"Ct.App.Br.": Brief to the Court of Appeals (Appellant's, unless otherwise indicated; context will show if brief in Case 1 or 2)

"Rep.Br.": Reply Brief in Court of Appeals

"a": refers to pages of appendix to this petition

"A": refers to pages of various appendices filed by appellant in Court of Appeals; to facilitate reference, one set of numbers was used for both cases:

"A1-558": pages in separate appendix in Case 1

"A559-581: appendix pages annexed to Case 1 Reply Brief

"A601-876": separate appendix in Case 2

"Tr.": Transcript of April 12, 1978 hearing in Case 1, filed Sept. 14, 1979

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OPINIONS BELOW. The Court of Appeals' judgments without opinion (1-3a)* are at 675 F.2d 1340. Unreported are the orders denying rehearing (3-7a). In Case 1, the District Court opinion-order granting summary judgment (29a-34a) is reported at 481 F.Supp. 647; the order denying complaint amendment (35a) is unreported. The Court of Appeals opinion in the prior appeal (37a) is reported at 569 F.2d 119. In Case 2, the District Court's dismissal order (22a) and orders underlying dismissal (23-26a) are all unreported.

JURISDICTION. The judgments of the court of appeals were entered on Feb. 5, 1982 (Case 2) and Feb. 9, 1982 (Case 1). Timely petitions for rehearing and/or rehearing en banc were denied on March 19 and 23, 1982. On June 8, 1982, Chief Justice Burger extended the time to file this petition to and including August 16, 1982. This Court has jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISION, STATUTES AND RULES. Pertinent parts of the following are in Appendix 10 (59a): 5th Amendment, U.S. Constitution; 28 U.S.C. §§455(a), (b)(1), (e) and 1654; F.R.Civ.P. 26(b)(1,3), (c), 34(b), 37(a)(2), 37(b)(2)(C).

STATEMENT OF THE CASE

The material facts concern not the merits but claimed due process violations that precluded Jackson's contentions on the merits from ever being addressed below.[1] The overriding fact is that claimed overt personal bias and prejudice of the trial judge is *fully and extensively supported by unquestioned official court*

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*"a" refers to pages of appendix hereto. Abbreviations are fully set forth at end of table of contents, *supra* v.

1. Regarding substance, Case 1 is for common law copyright infringement, and Case 2 for fraud in a purported settlement of Case 1. On Sept. 24, 1979, the district court granted defendants summary judgment in Case 1 while denying like relief to Jackson; but the court waited until Oct. 2, 1979 to deny the complaint amendment motion also pending on Sept. 24. Case 2 was dismissed on Aug. 22, 1980 solely for Jackson's alleged specific refusal to depose on Sept. 4, 1980 (the order making no mention of his detailed objections to the entire defense discovery package, especially including Interrogatories and Documents Request due August 13, 1980). Jurisdiction was under 28 U.S.C. §1332 (citizenship diversity).

documents. Also, the appeals court judgments were squarely based on refusal to disqualify the District Judge, which both sides agreed was the central issue. *Infra* 6-7.

Partiality, Bias and Prejudice in Case 1. On the prior appeal, from summary denial of a F.R.Civ.P. 60(b) motion to vacate a *sua sponte* dismissal, Jackson took over from counsel and obtained a remand. *Jackson v. Wash. Monthly, supra.* The Appeals Court harshly criticized the trial judge, suggesting he had: 1) acted "contrary to what the vast majority of courts expectably would do"; 2) raised "problems of fairness—and perhaps of due process"; 3) been too drastic in not first using lesser sanctions; and 4) abused discretion with "a pointless exaction of retribution" against an innocent client while letting off the guilty lawyer scot-free, etc. (41a, n.11; 44-45a).

Nevertheless, the case was remanded to the same judge.

At an April 12, 1978 hearing, devoted solely to formalities of making a record on events causing the prior dismissal (Tr. 61:15-19; 110:1; 111:1, 22-24) and reopening the case (Tr. 183-4; 188:6-8), that judge manifested partiality, prejudgment and personal dislike of Jackson for being pro se and for successfully appealing.[2]

Pro Se Resentment. The Judge said, e.g.: "There is nothing on God's earth worse than a pro se litigant unless he's completely ignorant, and the other one is one who thinks he knows everything" (Tr 182:7-9). "You're not a lawyer. . . . That's what has taken so long" (Tr 102). "Stand up if you want to act like a lawyer, your own lawyer or anybody else's lawyer" (Tr 79) (Cf. 52a-55a).

Resentment of Prior Successful Appeal. E.g.: When Jackson sought to cross-examine a defendant: "Well, you know what's going to happen if I don't let him do it. He will go right back up to the Court of Appeals and say I arbitrarily cut it off" (Tr 182). "The Court of Appeals doesn't know as much as I know about this case" (Tr 178-9). The case "certainly" has "given the Court of Appeals trouble and it gives this Court

2. A more detailed analysis of the hearing than is possible here was submitted to the Court of Appeals and is at *infra* 47a-58a. "Tr" refers to transcript of April 12, 1978 hearing and is with the original record sent up to this Court under Rule 19.1.

trouble" (Tr 100). "[I]f I had known, you wouldn't have had to go to the Court of Appeals. Don't you understand that?" (Tr 179-80). (Cf. 50-52)

Reluctant Restoration. "I know what the Court of Appeals said and I know what I am going to do, what I have to do . . . ." (Tr 37). The judge reopened the case only on constraint of an appellate mandate he resented: "And there is no way that I can keep him [Jackson] from having a 60(b) motion granted, no way" (Tr 183). Ominously, in his very order reopening the case, he directed defendants to move for summary judgment by a date certain (A3, 77p; Tr 188)

Prejudgment of the Merits. **BEFORE** any evidence on the merits was ever submitted to him, the judge prejudged both the case and the summary judgment motion; e.g.: The litigation "should not [have been] brought" and Jackson's ex-lawyer was "suckered in" (Tr 192). (By contrast, the Appeals Court earlier rebuked the lawyer for gross negligence and deceit. (42a43a). *Before* submission of any summary judgment motions papers, at the hearing the judge indicated had nothing to do with a summary judgment motion on the merits (Tr 188), he said: "the basic facts are not that much in dispute. They really aren't." (TR 191). He told defense counsel: "I think you are in a position to" move for summary judgment (Tr 185). Also, the judge repeatedly disparaged the case as a "complete waste of time" (51a). Finally: "What you can't tell me in 35 pages . . . won't be worth saying about *this* case" (Tr 190; emph. added).

Prejudgment of Jackson. Part of the judge's hostility to Jackson was expressed in a very low opinion of Jackson's ability (and anything he might say or submit). E.g.: "We could spend the rest of the day . . . trying to have Mr. Jackson understand, and there's no point. . . . He would not understand" (Tr 36). "You might know a lot about history, but there's a lot else you don't know about lawyers and the law" (Tr 193). "You wouldn't even know how to draft an order" (Tr 193). (8 days earlier, the judge signed a Jackson-drafted order (A15a)).

Favored Treatment of Defendants. Defense counsel: "We're almost finished." The judge: "Don't hurry at all because we can come back tomorrow if we don't get finished tonight" (Tr 173). Minutes later, spurning Jackson's attempt to

cross-examine: "No, we are going to finish this tonight. I have other things set for tomorrow" (Tr 181). See also 55-58a.

Self-Fulfilling Prophecy Fulfilled. Having prejudged Jackson (as a pro se incompetent not worth serious consideration) and his case (as unworthy of being brought), the judge again threw Jackson out of court without addressing *any* of Jackson's arguments and/or affidavits on the merits, or other extensive papers, prepared with great effort. See *infra* 30-32.

Partiality, Bias and Prejudice in Case 2. Each of the myriad examples cannot be given (cf. Ct.Ap.Br. 67-71; 41-48). But for an idea of blatant partiality, two examples merit mention: grossly disparate time allowed Jackson and defendants; and extensive discovery ordered without any showing of need or relevance.

Vastly Disparate Time Allotments. First, defendants answered the complaint Aug. 15, 1979, *two months late*, over Jackson's strenuous objection and with no adverse criticism by the judge.[3] Second, on Nov. 6, 1979, the N.Y. plaintiff received defendants' demands for discovery twice 3 days apart and including a massive 12 years' documents, *infra* 5. On Nov. 11, 1979, Jackson asked defense counsel for a first time extension. A copy of the letter (27a) was sent to the judge, who instantaneously responded to this courtesy with a Nov. 16, 1979 *sua sponte* order (26a). Pro se Jackson, working wholly alone, was directed to seek recusal by motion (by Nov. 30), and meet the original Dec. 3 and 6 discovery dates—with not a single time extension. The order, received Nov. 21 (A746), left Jackson 9, 12 and 15 DAYS (running concurrently) to perform time-consuming tasks.

Defendants were directed to "proceed with discovery" (i.e., not agree to the time extension sought by plaintiff—they agreed to a limited time extension anyway— (A733). Also, represented by the 35th largest U.S. law firm, defendants were given all the time they requested (A722) to move for dismissal: to Jan. 30, 1980, two MONTHS.

3. Jackson never objected to giving defendants more time. Here, his objection was that they sought an unspecified extension of time to answer, so that they could, without inconveniencing themselves, object to service of process on some of them and, in turn, inconvenience Jackson by forcing him to reserve what defendants admitted had already been received. Ct.App.Br. 11-12.

Without detailing subsequent orders, the judge consistently imposed intense discovery time pressures on Jackson and never took into account his need for a manageable schedule (Ct.Ap.Br. 54). Defendants' huge law firm was consistently allowed all time sought, including an opposed extension of time to oppose a time extension for the lone pro se Jackson (Ct.Ap.Br. 17).[4]

Defendants' Unsupervised Carte Blanche Discovery. E.g., they demanded 12 years' documents; income tax returns; "all" legal proceedings in which Jackson was defendant, plaintiff or "otherwise involv[ed]"; "all" non-public documents in Jackson's cases against defendants and his ex-lawyer; "all" documents relating to "any" communication concerning the litigation with "any" person, thus including memoranda of attorney-client communications between Jackson and his ex-lawyer; "all other documents in any way relevant"; a virtual restatement of the detailed 16-page complaint; and "all" Jackson's unpublished writings for the very defendants he sued for copyright infringement (Ct.Ap.Br. 13-14, 56-67). Also, despite said detailed complaint, and defendants' insistence on the Washington forum against plaintiff's choice, defense counsel who have a N.Y. office demanded that the N.Y. plaintiff come to Washington twice in one week (once, carrying "the original *and* any copy" of 12 years' documents). *Infra* 30n.

Jackson contended only a partial and prejudiced judge would allow defendants carte blanche for such discovery, and without requiring a showing of need or relevance; and indeed make a *sua sponte* order compelling that discovery before any

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4. At appellate oral argument, defense counsel said Jackson "received" a "number" of extensions, alleging: "us getting better treatment than he is just not the case" (15a). In fact, to "receive" his time (opposed always but once for far less than needed), he had to disobey two impossible orders (Ct.App.Br. 41ff), one *sua sponte* (26a) and the other rejecting his stay/time-extension motion (25a). These orders and the time taken by Jackson were expressly used against him to dismiss the case (22a). By contrast, the defense goliath did not have to disobey any order or suffer any consequences to obtain needed time. Cf. 19a.

Moreover, counsel argued Jackson was "very late" in making specific discovery objections (13a, 20-21a). If so, then Jackson received no genuine extension at all. (But he did make earlier objections; see *infra* 30n, A845, and Ct.Ap.Br. 40,55.)

motion to do so, or any refusal or failure to make discovery (Ct. Ap.Br. 45,67,14; 26a). At oral argument, the appeals panel sharply condemned the discovery but sympathized with the judge, establishing unwillingness to remove him as dispositive.

Appellate Oral Argument.[5] (a) *Discovery Condemned.* Judges' comments included, e.g.: (a) Defendants "did ask for everything under the sun in discovery" (12a). (b) "[Y]our discovery was not narrowly focused and tight . . . and it was not clear that all which you were asking for was related to the cause of action" (17-18a). (c) Defendants were not "entitled to prevail under an incredibly broad request because you know he will not give anything" (18a). (d) Discovery not "legitimate" (18a). (e) "It is not unknown for a large, well-staffed law firm meeting either a single practitioner or a pro se plaintiff to try to inundate him in discovery" (18a).

(2) Recusal Aversion Dispositive. The D.C. Circuit has not removed a District Judge for bias and prejudice under any recusal statute since 1941. *Infra* 19. Here, apart from discovery, the only other issue in Case 2 was recusal (Ct.Ap.Br. 1). (The due process issue of disparate time is part of recusal since no impartial judge would make such allotments.)

Most important, the parties agreed recusal was central. At oral argument, Jackson said: "the fundamental issue was recusal" (10a). Defense counsel argued the court "can very properly affirm" because Jackson's "real objections" were not to discovery and he made "a decision that if this judge was going to continue the case, he was not going to have any part of it" (17a).

3 days later, worried counsel proffered a written reply on oral argument, "concerning the breadth" of discovery and if defendants "tr[ied] to overwhelm [their] adversary with burden-

5. Given the absence of a written opinion but the clarity with which, at Case 2 oral argument, 2 judges (Edwards, Davis) expressed their views on the critical recusal and discovery issues, in unequivocal declarative sentences, that argument is reproduced at *infra* 8a-19a (with inconsequential omissions). (One judge remained silent.) Argument of Case 1 is not reproduced because, aside from the expense, it was largely on copyright substance mostly uncontested in this petition, Jackson's position being that judicial partiality prevented the copyright merits from ever being reached below.

some discovery" (20a). While trying to justify this discovery, *infra* 30n counsel's main point was, again, that discovery was irrelevant and dismissal proper because "more importantly" Jackson "makes it clear" he would make no discovery "unless . . . the . . . Judge was removed from the case" (20-21a).

Jackson does not deny, but in fact contends, he felt compelled to conclude it pointless to litigate before this judge. He strenuously argued below: (1) the judge was partial; (2) Jackson was entitled to an impartial judge from the very outset (per this Court, e.g., A757, 760); (3) any orders by a partial judge were/are inherently invalid, with no duty to comply (Ct.Ap.Br. 37); (4) non-compliance with orders contested in good faith as invalid is a legitimate, court-recognized option, when a litigant concludes compliance would cause severe and irreparable harm or prejudice (Ct.Ap.Br. 32ff); (5) emphasis on recusal did not excuse wholly improper and abusive discovery, or waive the right to be protected against it; (6) a litigant need not make specific objections for disposition by a recusal-worthy judge unauthorized to make rulings; and (7) Jackson was entitled to *final* recusal resolution *before* rulings on discovery objections. (Ct.Ap.Br. 55).

These contentions were never addressed by either court below. Since defendants' felt need to write an oral argument reply confirms Jackson's position that the panel strongly condemned their discovery tactics, and since no such tactics would, alone, be affirmed, Case 2 was decided solely on recusal aversion.

Once the panel rejected recusal in Case 2, it was also pointless to resolve the substance of other issues in Case 1, where a new judge was also sought. There being no reason why, absent the recusal issue, the appeals court would have affirmed the discovery in Case 2, there was equally no reason to decide issues other than recusal in Case 1 (decided after Case 2). It was futile to dispose of non-recusal issues in either case because the Jackson-Judge adversary posture was wholly untenable (Case 2 Ct.Ap.Br.70) and remand to a new judge too unpalatable.

Unpalatability. At oral argument, the court also made clear it held controlling, in applying the recusal statute, the superior insights of judges rather than the ordinary perspective of the lay

public. Applying the judges' perspective, the court showed sympathy and rationalization for its colleague.

(1) Jackson argued: "the recusal standard is not the superior insight of a judge into the problems of his colleagues, but what the average person on the street would think of this." The court responded: "*I do not think that is the standard. I do not think it is the average person on the street.* I think it is a reasonable position" (11a; emph. added).

(2) When Jackson noted the judge's pro se hostility (10a; *supra* 2), this followed: "THE COURT: . . . it is not . . . uncommon . . . to find pro se litigants hard because they are not lawyers. MR. JACKSON: Well, I have done my best. THE COURT: I know, but *you are not a lawyer.* MR. JACKSON: . . . if that is the attitude, why not just bar pro se litigants from court? . . . THE COURT: You can have a perfectly valid proposition to a non sequitur extreme. That is, *we do have to deal with pro se cases* . . . they are difficult not in the sense of being cantankerous, but because they are not lawyers" (10-11a; emph.added).

Later, defense counsel said e.g.: "We ourselves are *saddled* with a pro se plaintiff. The judicial system is *saddled* with a pro se plaintiff" (16a; emph. added).

Jackson's Unavailing Attempts to Elicit Appeals Court Recusal Reasons. The appeals court did not even try to explain in writing how it could affirm discovery it so strongly censured orally; nor did the court explain its recusal views in writing. Using all available procedures, ordinary and extraordinary, Jackson tried 7 times to obtain appellate recusal comment.[6] First, defendants argued the court should not address the issue because the extraordinary remedy sought was improper on so serious a matter; then, when he tried ordinary appeal, defen-

6. In case 1, recusal was sought by Dec. 21, 1979 summary reversal motion (den. Mar. 12, 1980: A565-7, in Rep.Br.), ordinary appeal and *en banc* suggestion, *supra* 4. In Case 2, trial judge denial of recusal (25a) was followed by mandamus petition (den. May 9, 1980; A568; part of record here: A870n) and *en banc* suggestion thereon (den. June 18, 1980, No. 80-1357); recusal was then sought by ordinary appeal of dismissal and *en banc* suggestion, *supra* 1; *infra* 1a-7a.

dants suggested Jackson was estopped from having the issue addressed precisely because extraordinary remedy had been denied without comment. (Case 1 Reply Br. 25-6).

Next, defendants objected to all Jackson recusal efforts as untimely (e.g., at Case 2 Ct.Ap.Br. 22). He countered all efforts were timely and recusal cannot be involuntarily waived.[7]

In any event, without writing a word of explanation — ever — the court rejected Jackson's repeated invitations to address the grave recusal issue. True, it never wrote that the judge's conduct was improperly partial or biased; but it never wrote the contrary either.

REASONS TO GRANT CERTIORARI

In the wake of growing complaints of non-enforcement, this petition confronts the critical problem of how to assure *in practice* the due process and statutory right to an impartial federal trial judge. Impartiality has been often heralded in principle by this and many other courts. Yet, this Court has (a) not squarely addressed the issue of federal trial judge bias under any recusal statute since 1921, (b) never reversed such judge for failure to recuse in a civil case and (c) never construed the recusal statute, 28 U.S.C. §455 (1974). So this Court should grant certiorari to (a) establish a precedent that can be cited to lower courts that §455 *must* be enforced, however unpleasant; and (b) to resolve the conflicting broad and narrow interpretations resulting from the fact that some Circuits have taken §455 seriously while others have tried to vitiate or ignore it.[8]

This is not a garden variety recusal petition; it is *the ultimate* and *acid* test of the present much-criticized recusal

7. In particular, Jackson said there was no time issue at all in Case 2 because he stated recusal intent early, before any discovery or judicial rulings. Cf. A819-20. Also, defendants were late in Case 2 (*supra* 4). In Case 1, the judge discouraged immediate ordering of the key April 1978 hearing transcript, thus not filed until Sept. 1979 (*supra* 2ff; Tr. 1,187-8); and there were many other grounds for recusal that occurred much later than the hearing. See A820-27, 745-9; and esp. A574-78 in Case 1 Rep.Br. This was also discussed in Case 2 Rep.Br., *infra* 30n. On the law: *infra* 21.

8. On other reasons to grant review, including denial of basic rights, see *infra* II-IV.

scheme. This is because the facts mandating recusal are (i) fully and extensively documented[9] and (ii) as blatant an example of overt partiality as this Court is going to see. If §455 is unenforceable here, warranted recusal cannot be obtained in myriad other cases where the facts are far less, if at all, well documented or are not nearly as egregious.

Just as no elaborate discourse is needed to establish the impropriety of extracting a confession with a rubber hose, so too merely to state the instant facts, *supra* 1-9, is to show grave violation of due process in general and of the right to an impartial trial judge in particular. A judge is clearly partial where, as here, he, e.g.: (a) expresses views on the case and summary judgment motion before having a shred of evidence or motion papers on the merits; (b) uses intense time pressures against a pro se (*sua sponte* denying even one extension) while allowing an opposing huge law firm all the time it wants; (c) expresses personal hostility toward a litigant; (d) compels, *sua sponte*, unsupervised carte blanche discovery against the litigant, etc.

Petitioner's problem, then, is not to show the trial judge's actions were wrong and partial, and he will not belabor the obvious. The problem is they were so biased as to be, so far, too embarrassing to mention and too well-supported to justify in a written opinion. This must be confronted head-on, because the strongest consideration against certiorari is doubtless the personal and institutional pain and embarrassment. This will be shown to be outweighed by enhanced respect for the judiciary and avoidance of even greater embarrassment. *Infra* 22-23.

But first it is appropriate to set forth the legal and policy basis for undertaking so unpleasant a task.

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9. This is not a matter where, true or not, allegations of bias must be accepted as true for recusal purposes. Cf. *infra* 27n. Here, there are statements of facts supported by official copies of the judge's own words.

I. SUPERVISORY POWER SHOULD BE EXERCISED TO STEM THE TIDE OF LAGGING AND CONFLICTING ENFORCEMENT OF THE RECUSAL STATUTE GOVERNING *FEDERAL* TRIAL JUDGES, AND TO AVOID ADVERSE APPEARANCES AND PROMOTE PUBLIC CONFIDENCE IN THEIR IMPARTIALITY.

Unique in terms of its documentation, this case is regrettably all too typical of the flagrant failure to enforce the recusal statute when federal trial judges are involved.

And no wonder. 28 U.S.C. §455 is *sui generis*. No other law provides that (a) validity of serious charges be determined by the person charged (who must make the charges if no one else does) and (b) appeal be to the person's professional friends and colleagues. This scheme is contrary to all accepted notions of elementary propriety and fairness. Accordingly, there has been growing dissatisfaction and proposals for change, which surely would not occur were the instant matter an aberration.

A. COMMENTATORS AND THE BAR. Protests mount that warrant federal-trial-judge recusal is "seldom" and "rare."[10] They are voiced by experienced lawyers, and scholars who have done exhaustive research.[11] Their motif is recusal is least likely when most justified because §455 requires judges to

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10. That recusal rarely occurs when warranted does not mean it is usually warranted. The theme here is that what occurred below is a departure from what is, hopefully, "accepted and usual" under Rule 17.1. Nevertheless, the frequent complaints and proposals for reform cited in the text suggest that the right to impartial adjudication is, in practice, denied far more than litigants have a right to expect.

11. E.g.: Comm. on Fed. Cts., N.Y.C. Bar Assoc., "Proposal for Peremptory Challenges," 36 *Record* 231 (1981); Browning, *Evaluating Judicial Performance*, 90 F.R.D. 197, 205 (1981) (quoted *infra* 12); Comment, 7 *Seton Hall L.R.* 612, 615 (1976) (success "rare"); Comment, 46 *Chicago L.R.* 236, 267 (1978) (federal courts "lagged in implementing" 1974 "mandated" recusal changes); Comment, 34 *Wash. & Lee L.R.* 1201, 1205-6 1216 (1977) (same; "numerous commentators dissatisfied"); Note, 45 *Fordham L.R.* 139, 155, 157 (same; 1974 reform "seems doomed"); Recent Development, 61 *Virginia L.R.* 236, 251 (1975) (recusal rare); *Duplan v. Deering Milliken*, 400 F.Supp. 497, 513 (D.S.C. 1975) (successful try for recusal for bias and prejudice: "extraordinary").

decide their own cases and rule themselves possibly or actually partial.[12] The frustrated response has been myriad proposals for recusal via peremptory challenge, endorsed by such respected groups as the American and New York Bar Associations.[13] But it is preferred that federal courts find a way to assure recusal when needed, in their own way, rather than have Congress do it for them.[14]

To leave undisturbed the perceived non-enforcement of §455 will surely make a reality of 9th Circuit Chief Judge Browning's fear of an "approaching destructive confrontation on the issue of [federal] judicial disqualification." *Supra* 11n, 90 F.R.D. at 205. Statutory provisions to disqualify for cause, he noted, have been "interpreted narrowly"; the result: "seldom granted" recusal motions and "rarely successful" appeals. *Id.* So he not surprisingly concluded: "There is a need, but . . . no effective remedy." While he says the "obvious

12. See, e.g., *supra* 11n: N.Y.C.B.A., 36 *Record* at 231 ("judges are often reluctant to admit" alleged recusal facts); 46 *Chicago* at 263 (to some, "judge's evaluation of . . . own impartiality inevitably appears suspect); 45 *Fordham* at 148, 155, 157; 7 *Seton Hall* at 615, 619 ("greatest problem . . . challenged judge" rules on recusal). See also: Comment, 25 *Depaul L.R.* 104, 126 (1975); Note, 77 *West Va. L.R.* 763 (1975); Frank, "Disqualification of Judges," 35 *Law and Contemporary Problems* 43, 65 (1970).

13. N.Y.C.B.A., *supra* 11n, 36 *Record* at 232, 234, 244n.8, 245, n.14, on its own challenge proposal and A.B.A. support for the procedure; cf. *Nat. L. J.*, Aug. 11, 1980, 3, 25. See also, e.g., 45 *Fordham* at 159-63; 7 *Seton Hall* at 633-635; 77 *West Va., passim;* Frank, *supra* n.12. Opponents, mostly judges, concede the serious problem causing the proposal; e.g.: Browning, *supra* 11n; Bartels, "Peremptory Challenges: A Judge's View," 68 *A.B.A. J.* 449 (1982); Chaset *Disqualification of Federal Judges by Peremptory Challenge* (F.J.C. 1981).

14. See *infra* 20; N.Y.C.B.A., *supra* 11, 36 *Record* at 238. Cf. Chief Justice Burger: "some kind of legislation is going to be passed . . . I would . . . rather have the kind that I like rather than the kind someone else likes." Remarks, D.C. Circuit Judicial Conference, 81 F.R.D. 263, 277 (1978). Here, this Court can make legislation unneeded by mandating recusal under guidelines it prefers.

answer is to make challenge for cause an effective means of removing a judge when removal is justified," *id.*, by his own account and that of many others, the lower courts have not done the job.

That leaves the Supreme Court, here, as the last hope to make §455 viable.

B. THE LACK OF A SINGLE SPECIFICALLY APPLICABLE SUPREME COURT PRECEDENT PERMITS DISREGARD AND ATTENUATION OF §455. Were there not a huge gap in *practice*, there would be no need to state, let alone cite, authority for an ostensibly undisputed *principle*: the right to impartial adjudication, in fact and in appearance, is fundamental, required by due process and justice, Constitutional and statutory, and of the utmost importance to public confidence in the judicial system and, hence, to democracy and the administration of justice. A review of this Court's impartiality cases, however, reveals the void between principle and practice.

This Court simply has not applied impartiality to *Federal* trial judges in *civil* cases (and rarely in others). "The Supreme Court has never reversed a federal judge on due process grounds for failure to disqualify himself." 46 *Chic. L.R.* at 237n, *supra* 11n. Nor has this Court reversed a federal judge for disregarding a recusal statute since 1921. *Berger v. U.S.*, 255 U.S. 22, 34-36 (criminal case). The thorny conflicting substantive and procedural problems of 1974's §455 amendments have never had this Court's scrutiny. Instead, it has applied the impartiality tenet to *state judges* and to *administrators*, state and federal—but not to federal trial judges. Consider:

I. CRIMINAL CONTEMPT: STATE JUDGES. *In re Murchison*, 349 U.S. 133, 136 (1955) (impartiality basic to due process); *Bloom v. Ill.*, 391 U.S. 194, 205 (1968); *Mayberry v. Penn.*, 400 U.S. 455, 465 (1971); *Johnson v. Miss.*, 403 U.S. 212, 216 (1971) (unbiased judge "essential to due process"); *Taylor v. Hayes*, 418 U.S. 488, 501 (1974) (same).

II. CRIMINAL CONTEMPT: FEDERAL JUDGES. *Cooke v. U.S.*, 267 U.S. 517, 539 (1925) (other than open court contempt, and only "where . . . not . . . impracticable": a judge in contempt case "may" ask other judge to take his place; not the ground for reversal); *Offutt v. U.S.*, 348 U.S. 11, 14

(1954) ("justice" applied under "supervisory authority" of Court rather than due process clause or recusal statute).

III. OTHER CRIMINAL: FEDERAL JUDGE. *Berger, supra* 13 (1921; only Sup. Ct. reversal of federal judge for bias under any recusal statute: predecessor to §144).

IV. OTHER CRIMINAL: STATE JUDGES. *Tumey v. Ohio*, 273 U.S. 510, 532 (1927) ("due process" requires impartiality); *Ward v. Monroeville*, 409 U.S. 57, 61-62 (1972) ("constitutionally acceptable" procedure requires "neutral and detached judge in the first instance").

V. STATE ADMINISTRATIVE ADJUDICATION. *Goldberg v. Kelly*, 397 U.S. 255, 271 (1970) (BRENNAN, J. for Court: "of course, an impartial decision maker is essential" to due process; civil); *Morrissey v. Brewer*, 408 U.S. 471, 485-6, 489 (1972) (BURGER, C.J., for Court: "neutral and detached" hearing body required for parole revocation); *Gibson v. Berryhill*, 411 U.S. 564, 577-9 (1973) (WHITE, J., for Court unanimous on this; de novo review inadequate; "possible personal [pecuniary] interest" of hearing board: constitutional disqualification).

VI. FEDERAL ADMINISTRATIVE ADJUDICATION. *Wong Yang Sung v. McGrath*, 339 U.S. 33, 50 (1950) (constitutional hearing must be impartial); *Commonwealth Coatings Corp. v. Continental Casualty Co.*, 393 U.S. 145, 147, 150 (1968) ("impartiality taken for granted in every judicial proceeding"; actual fairness unquestioned, yet reversal of arbitration: "must avoid even appearance of bias"); *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980) (MARSHALL, J., for unanimous court: impartiality "important to popular government" and due process; neutrality requirement "jealously guarded by this Court").

These cases include reversals of 7 criminal contempt convictions, 3 other convictions and a parole revocation. Only 5 cases were purely and clearly civil: *Wong, Commonwealth, Goldberg, Gibson* and *Marshall*.[15] Care is no doubt due in review of convictions, especially where liberty is at stake. Ye

15. *Marshall* was an affirmance (only because a regional administrator acts as a plaintiff/prosecutor, not a judge). It is cited for its lengthy recent reassertion of the judicial neutrality requirement that surely governs the actual judge here.

four points merit stress in this regard.

(1) Certiorari in contempt convictions is very frequent in relation to their number, since such cases are "extraordinary."[16] And, whereas recusal is the central issue here, *supra* 6, the issue is often secondary or collateral in the contempt cases, where this Court's decisions have turned on matters extraneous to judicial partiality or bias.[17]

(2) If "contemptuous conduct, though short of personal attack, may still provoke a trial judge," *Taylor, supra*, 418 U.S. at 501, surely, as shown here, a trial judge may become personally involved due to factors wholly apart from contemptuous conduct.[18] E.g., can he become personally hostile toward a litigant for prior appellate success (especially, sharp appellate rebuke of the judge, *supra* 2). Cf. *U.S. v. Holland*, 655 F.2d 44, 47 (5th Cir. 1981). The judge can also be hostile to a litigant due to prejudice against a litigant's group, as shown by this Court's only case reversing for failure to disqualify for bias under the recusal statute. *Berger v. U.S. supra* 13. Here, of course, the trial judge explicitly stated his group prejudice: "nothing on God's earth worse than a pro se litigant [not] completely ignorant." *Supra* 2. Finally and ironically, the very act of seeking recusal can provoke or increase the judge's wrath (Case 2 Ct. Ap. Br. 70).

(3) As Justice BLACKMUN notes, "[t]he Court traditionally has held that the Due Process Clauses protect *civil* litigants who seek recourse in the courts. . . ." *Logan v. Zim-*

16. E.G., *Offutt, supra* 13 ("rather extraordinary power"); *Taylor, supra* 20, 418 U.S. at 500, 498 ("heightened potential for abuse"; "summary [contempt] punishment always . . . regarded with disfavor"); Comment, *supra* 11n, 7 *Seton Hall L.R.* at 624 ("exception" because personal to judge). Special provision is made for contempt recusal, F.R.Cr.P. 42(b), whereas general statutes §§144 and 455 apply to all other judicial proceedings.

17. E.g.: whether summary contempt power was aptly exercised [use of F.R.Cr.P. 42(a) vs. 42(b)], especially when contempt conviction was delayed until after trial; whether contempt was in open court, and requirements of notice and hearing opportunity when contempt not in open court; effect on client's right to zealous advocacy when contemnor is a lawyer, etc.

18. Ironically, in opposing Jackson's Case 2 recusal motion, defendants suggested Jackson did not "revile" or sufficiently attack the judge. Cf. A788n, 819.

merman Brush Co., __U.S.__, 102 S.Ct. 1148, 54 (1982) (emph. added; opin. of Court). Justice MARSHALL for the unanimous Court specifically pointed out: "The Due Process Clause entitles a person to an impartial and disinterested tribunal in *both civil* and criminal cases."[19] *Marshall v. Jerrico*, *supra* 14, 446 U.S. at 242; emph. added.

(4) When Courts refer to public confidence in the judiciary, they have in mind confidence of ordinary American citizens, who are most likely to have their only contact with the courts in *civil* suits rather than criminal proceedings. Indeed, civil litigation has literally exploded. Consider this table:

CASES PENDING IN FEDERAL DISTRICT COURTS*

	June 30, 1940	June 30, 1970	June 30, 1980
Civil	29,478	93,207	186,113
Criminal	9,553	20,910	14,759
ratio:civ to cr.	3.08 to 1	4.45 to 1	12.61 to 1

*Source: Office of U.S. Courts, *1980 Annual Report*, pp. 3,5. ratios calculated by petitioner

So between 1940 and 1980, in federal district courts, pending civil cases not only multiplied by 6.31, doubling between 1970 and 1980 alone, but the civil/criminal ratio grew from 3.1 to 12.6.

Average citizens who seek to resolve their disputes peacefully are, or should be, no less entitled to faith in judicial impartiality than those accused of criminal acts (particularly contempts).[20] Only this Court can stem the erosion of such faith caused by the rare warranted-enforcement of the recusal statute by the lower federal courts. There is no precise precedent and expression by this Court that it will not tolerate disregard of the

19. This is readily understood. A due process violation is not always more serious in a criminal matter; e.g., if all life savings are lost in a civil suit, is that less serious than 2 or 10 days spent in jail for criminal contempt? *Tumey* and *Ward*, *supra* 14, were convictions resulting in minimal fines.

20. Cf.: "There are countries where . . . the thought of resort to the judiciary for the settlement of important conflicts has been a bad joke. . . . Courts in the United States . . . are freshly experiencing some of the same . . . public discontent . . . ." Quoted, Recent Development, supra 11n, 61 *Va. L.R.* at 236n.

impartiality requirement for *federal* trial judges in *civil* cases.

That void is why the most that can be said for 28 U.S.C. §455 (1974) is that *some* judges, in *some* circuits, *sometimes* take it seriously; while others have emasculated the statute or disregarded it altogether.

C. THERE IS A CONFLICT IN THE EXTENT, IF ANY, TO WHICH CIRCUITS ENFORCE §455. The central conflict is whether §455 is to be enforced at all. In 1974, §455 was amended to "enhance public confidence in the impartiality of the [federal] judicial system." 3 *U.S. Code Cong & Admin. News*, 6351, 55 (1974) (emph. added). Nevertheless, complaints have gushed about "lagging enforcement" contrary to the letter and spirit of the 1974 act. *Supra* 11.

Only 5 circuit appeals courts have applied §455 (1974);[21] i.e., actually compelled involuntary recusal of federal trial judges.[22] To avoid enforcement, some circuits have sharply constricted the 1974 act; the result: *conflict and confusion.*

Thus, although the very title of the 1974 Act explicitly stated intent to "broaden" recusal grounds (59a), a respected Committee on Federal Courts complained in 1981: "It is unclear whether [§455(a)(1974)] was intended to broaden the grounds for disqualification. . . ." *Supra* 11n, 36 *Record* of N.Y.C.B.A. at 243n.1.

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21. *Rice v. McKenzie*, 581 F.2d 1114 (4th Cir. 1978); *In Re Rodgers*, 537 F.2d 1196 (4th Cir. 1976); *Potashnick v. Port City Const.*, 609 F.2d 1101, 1112-15 (5th Cir. 1980), *cert. den.* 449 U.S. 820; *U.S. v. Holland*, *supra* 15 (5th); *Roberts v. Bailar*, 625 F.2d 125, 128-129 (6th Cir. 1980); *Nicodemus v. Chrysler Corp.*, 596 F.2d 152, 157n (6th Cir. 1979); *SCA Services v. Morgan*, 557 F.2d 110, 116-7 (7th Cir. 1977); *U.S. v. Ritter*, 540 F.2d 459, 462, 464 (10th Cir.), *cert. den.*, 429 U.S. 951 (1976); *Webbe v. McGhie Land Title Co.*, 549 F.2d 1358, 1361 (10th Cir. 1977); *U.S. v. Bray*, 546 F.2d 851, 860 (10th Cir. 1976); *Bell v. Chandler*, 569 F.2d 556, 560 (10th Cir. 1978). Since 1974, two other Circuits have recused for bias without citing §455: *Reserve Mining Co. v. Lord*, 529 F.2d 181, 186ff (8th Cir. 1976) (involving refusal to obey court mandate); *Mims v. Shapp*, 541 F.2d 415 (3d Cir. 1976). The 3d Circuit later narrowed §455, *Schreiber*, *infra* 21.

22. Voluntary recusal, no ego threat, not infrequently occurs especialy on objective bases (e.g., personal or professional relation to party attorney; *ex parte* communication). The critical problem arises when a judge should recuse but does not; this most often involves bias and prejudice (i.e., the claim that he may be emotionally involved or unable to decide impartially). See *supra* n.12; *infra* 26-7.

While Chief Judge Browning noted the statute is "interpreted narrowly," *supra* 12, his 9th Circuit is among the narrowers. *U.S. v. Orlander*, 584 F.2d 876, 882 (1978) held new §455(a) a mere "technical change" not "setting a different test for disqualification for bias or prejudice from that in §455(b)(1)." This was promptly termed "unpersuasive" and "directly contrary" to legislative history. Comment, *supra* 11n, 46 *Chic. L.R.* at 248, 249. But the 9th Circuit reaffirmed *Orlander* in *U.S. v. Sibla*, 624 F.2d 864, 867 (1980).

Orlander was *accord: Davis v. Board of Commrs.*, 517 F.2d 1044, 1052 (5th Cir. 1975) (*en banc*) ("we give §§144 and 455 the *same meaning* . . . for purposes of bias and prejudice or when the impartiality of the judge might reasonably be questioned"; emph. added). *Davis* too was sharply criticized, e.g., as "an extremely narrow reading of this [1974] statute that was intended to broaden substantially the existing disqualification standards." Comment, *supra* 11n, 34 *Wash. & Lee L.R.* at 1221, 1207-8. Moreover, it was "difficult to understand" how the 5th Circuit found no evidence of 1974 overruling the §144 gloss, "since it was dissatisfaction with the application of the existing statutory standards that had prompted the movement to 'broaden and clarify' " recusal provisions. Note, *supra* 11n, 45 *Fordham L.R.* at 155.

(1) *D.C. Circuit Non-Enforcement.* Review here is sought of spurned recusals of a circuit that, significantly, also has expressly adopted the *Davis* interpretation, in *U.S. v. Haldeman*, 559 F.2d 31, 133n297 (1976) (*en banc*), *cert den*, 431 U.S. 933 (1977)[23] ("nothing" in legislative history of new §455(a) suggests intent to overturn old construction of §144 and old §455). *Haldeman* has evoked adverse criticism similar to that of like-minded circuits.[24] But, like the 9th Circuit, the D.C. Circuit also recently reaffirmed its narrow stance. *U.S. v. Heldt*, 668 F.2d 1238, 1272 n. 71 (1981).

23. *Haldeman* involved unique factors, not controlling here, that may have prompted certiorari denial. E.g., defendants were not united in seeking recusal and the pre 1974 statute applied. Also, there were myriad other issues for which review was sought.

24. See comments, *supra* 11n: 61 *Va.L.R. passim*; 46 *Chicago L.R.* at 238n, 255-256, 266n.

If anything, the D.C. Circuit has been narrower than the 5th. E.g., the D.C. Circuit *now* holds recusal for prejudice "is required *only* if the alleged prejudice stems from an extra-judicial source," *id.*, at 1272 (emph. added), while the 5th holds judicially acquired prejudice *can* be a recusal basis. *Davis, supra*, 517 F.2d at 1051; *Holland, supra* 15. In fact, this is an abandonment of the D.C. Circuit's *Whitaker v. McLean*, 118 F.2d 596 (1941), and that is precisely the problem here: the D.C. Circuit has not enforced any recusal statute against a trial judge's wishes since 1941.

(2) *The Recognized Need for Supreme Court Supervision to Resolve the Conflicts and Assure Uniform Enforcement.* If the 9th Circuit's *Orlander* was "unpersuasive" and the 5th Circuit's *Davis* was "difficult to understand," *supra* 18, the 10th Circuit's *U.S. v. Ritter, supra* 11n, which "openly disagreed" with the 5th Circuit, comment, *supra* 11n, 34 *Wash & Lee L.R.* at 1211, is a "better approach" and "true to the language and spirit of section 455(a)," 46 *Chic.L.R.* at 249, *supra* 11n. *Ritter* expressly quoted the 1974 Act's title, to "broaden" recusal grounds, 540 F.2d at 462. Although this congressional aim also has been accepted—and enforced, cf. *supra* 17n22—by the 4th, 5th and 6th Circuits,[25] other circuits have not. So it has been recommended, 34 *Wash. & Lee* at 1221:

> The eventual solution for eliminating the inconsistencies in statutory interpretation and effectively implementing congressional intent is *uniform* federal court application of the 1974 amendments in a manner similar to the construction in *Ritter*. [Emph. added]

The time has come to provide that "eventual solution"; it has been pointed out, Comment, 13 *Wake Forest L.R.* 353, 368 (1977):

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25. E.g., as cited *supra* 17n: *Rice*, 581 F.2d at 1116 ("broader" scope of §455(a) "shown by the legislative history" and "clearly apparent" from §455(e)); *Potashnick*, 609 F.2d at 1112, 1115, 1104 (in any questionable case, judges must fully accept obligation to err on side of caution and recuse: "preferable"; reversal despite time and expense of 33-day trial with 25-volume record and 11 briefs on appeal); *Roberts*, 625 F.2d at 129 (recusal required in close case); *Bell*.

> Either Congress must take the initiative by making section 455 more detailed or the judiciary must assume responsibility for its own members. . . . Since detailed interference by Congress in court procedures is undesirable, the *Supreme Court* must . . . set[ ] forth specific standards for disqualification. [Emph. added.]

See also, Comment, *supra* 11n, 7 *Seton Hall* at 635, 638, 640-1 ("most desirable" for Supreme Court in "supervisory capacity" to establish recusal standards and guidelines for whole federal court system).

Such uniform standards are vital now *a fortiori* because, apart from conflict on the overall issue whether §455 aimed to broaden prior recusal grounds, the circuits resisting more breadth have devised myriad means of imposing narrowness.[26]

D. THERE ARE INTER-CIRCUIT CONFLICTS IN SPECIFIC SUBSTANTIVE AND PROCEDURAL CONSTRUCTIONS OF §455.

(1) *Recusal Perspective Conflict.* At oral argument below, Jackson argued recusal is governed by "not the superior insight of a judge . . ., but what the average person on the street would think. . . ." The court expressly disagreed. *Supra* 8. Nevertheless, Jackson used 5th Circuit words, *Potashnick, supra* 17n, 609 F.2d at 1111, that recently have been accepted by the 8th Circuit, *U.S. v. Poludniak*, 657 F.2d 948, 954 (1981) and, ironically, by the D.C. Circuit, *Heldt, supra* 18, 668 F.2d at 1271 ("showing . . . to permit the average citizen reasonably to question a judge's impartiality").

The 10th Circuit has gone further: the question is if there is "a reasonable likelihood that the cause will be tried with the im-

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26. E.g., the Second Circuit, citing the D.C. Circuit, says the recusal statutes are broader than the Constitution; *In Re International Business Machines Corp.*, 618 F.2d 923, 932n.11 (1980). In light of narrow interpretation of the statutes, *supra* 12, 18, this does not say much for the Constitutional right to an impartial judge, *supra* 13ff. In *U.S. v. Heldt, supra* 18, 668 F.2d at 1271, the D.C. Circuit narrowed §455 by rejecting the traditional view of this Court that affidavits in support of recusal must be accepted as true. *Berger v. U.S., supra* 13. Finally, the statutes have been narrowed by "quibble over the source and nature of the bias," e.g., whether "extrajudicial" (*supra* 19). Comment, *supra* 11n, 7 *Seton Hall* at 617; Note, *supra* 11n, 45 *Fordham* at 143 ("bias against a litigant's cause or type of case"); Comment *supra* 12n, 25 *Depaul* at 126.

partiality that *litigants* have a right to expect. . . ." *U.S. v. Ritter, supra* 17n, 540 F.2d at 464 (emph. added).[27]

So the court's oral argument view conflicts with the 5th, 8th and 10th Circuits, and the D.C. Circuit itself. This Court should grant review to decide, once and for all, whether the controlling perspective is that of judges, the average person on the street, or the litigants themselves.

(2) *Timeliness, Waiver and Other Procedural Conflict.* Below, defendants argued Jackson sought recusal too late. Without conceding untimeliness in fact, *supra* 9, he notes the clear inter-circuit conflict on whether the law imposes any procedural requirements in seeking recusal. See *SCA v. Morgan, supra* 17n, 557 F.2d at 117 (7th Cir: §455 "mandatory . . . addressed to the judge"; "no duty on the parties" to seek recusal, nor time limits to do so; no waiver and estoppel); *Roberts v. Bailar, supra* 17n, 625 F.2d at 128 (6th Cir: §455(a) imposes "no particular procedure that a party must follow to obtain" recusal; instead, trial judge has "independent duty to recuse" *"sua sponte"* under "mandatory guideline"); *contra: In Re IBM, supra* 20n, 618 F.2d at 932-3 (2d Cir.: implicit timeliness requirement in §455); *U.S. v. Schreiber,* 599 F.2d 534, 536, 539 (3d Cir. 1979) (burden "heavier than under accepted standard" when recusal timely sought; non-recusal must be "plain error"; cf. concurrence: plain error doctrine "ill-suited" because "absolutely no duty" of party to seek recusal); *U.S. v. Sibla, supra* 18, 624 F.2d at 868 (9th Cir: *accord Schreiber* majority).

The 5th Circuit is internally split. Most recently, a panel found a timeliness requirement in §455(a)—cf. *Schreiber* concurrence—and strongly suggested one in §455(b) notwithstanding §455(e)(prohibiting and limiting waiver). *Delesdernier v. Porterie,* 666 F.2d 116, 121, 122n (1982).[28] But is questionable that this panel could overturn the *en banc* 5th Circuit decision in *Davis v. Board, supra* 18, 517 F.2d at 1051 (§455 is self-enforcing on the judge; recusal *may* be raised by a party on trial

27. Cf. Chief Judge Weinstein (EDNY): "I don't want anybody . . . before me who doesn't think he'll get an impartial hearing. *Litigants* have got to go away from the court thinking they got a fair deal." (Emph. added.) *Nat. Law. J.,* Oct. 15, 1979 at 15; Judge Kaufman (2d Cir.): "The losing party must feel he is not the victim of the Judge . . . ." *New York Times,* Jan. 24, 1981 at 23.

court motion *or* on appeal). The latter is just what happened in the 5th Circuit's *Potashnick* reversal after time-consuming and expensive trial. *Supra* 19n.

E. GRANTING CERTIORARI WILL BE FAR LESS EMBARRASSING THAN LEAVING UNSUPERVISED THE DESTRUCTIVE ISSUE OF FEDERAL-TRIAL-JUDGE RECUSAL. The foregoing would, alone, suffice to grant review, except that: "It is not a pleasant task to pass critical judgment upon the conduct of another judge, and the easy road [is] facile approval of what has transpired in this case." *U.S. v. Pastor*, 557 F.2d 930, 947 (2d Cir. 1977) (Van Graafeiland, J., dis.). Cf. Chief Justice BURGER, *supra* 12n ("where the problem exists, it is pretty painful").

This, together with the absence of a specifically applicable Supreme Court precedent, is, to anyone with the tiniest insight into interpersonal and institutional relationships, the real reason for the opinionless decisions below. Also, it has been suggested recusals can undermine confidence in the impartiality of federal judges. Chaset, *Disqualification, supra* 12n, at 61-63.

The issue, then, is reduced to whether respect and confidence are promoted by forthrightly dealing with concrete problems as they arise, or by avoiding them and hoping no one will notice. One can no doubt plausibly argue that, if this Court grants review, it might bring this case to public attention. This would cause embarrassment by laying bare the fact, well known to those with courtroom experience, that sometimes federal judges lose control of their emotions and are not impartial. On the other hand, if this case is ignored, realistically, petitioner being unknown, the public would never notice and the egregious partial misconduct below would never come to light, thereby leaving the federal judiciary's image unmarred.

While an attractive and "easy road," this argument is fallacious. First, petitioner is confident, at least he hopes, that most judges will not decide so calculatingly. Second, the argument accepts too uncritically the view that embarrassment and disrespect must follow sincere correction of misconduct. The public admires courage, and respect for the judiciary will be enhanced by proclaiming that (a) yes, judges are human, but (b) when their frailties get the better of them, higher authority is ready, willing and able to remedy. It will be a firm basis for increased admiration if the federal judiciary deals with its own in-

ternal misconduct and is prepared, no matter how interpersonally distressing, to demand of itself the same high standards of due process it repeatedly enforces against other parts of government, notably administrators and state judges.

Third, this case is, after all, a matter of public record that could be noticed at least by those most dissatisfied with the present recusal scheme and pressing for reform.

Hence, the issue will not die with this case because there are many like cases; the well documented record here will compound the shame, reinforcing the view that silent appellate condonation of egregious trial judge partiality is common and other complaints of bias are justified. By contrast, cf. *A & C Adjusters v. Bragg*, 205 A.2d 602, 604 (D.C. App. 1964):

> This court has been asked infrequently to review cases of judicial impropriety. . . . However, when called upon, we have not hesitated to express strong disapproval of conduct which exceeds the bounds of judicial restraint.

It is precisely such "strong disapproval" that fosters confidence in the hypothesis that such cases do indeed occur only "infrequently" and are corrected.

In sum, the strongest reason not to grant review is also the most persuasive practical reason *for* doing so: minimizing personal and institutional pain and shame. This is especially critical at a time when the federal judiciary is resisting myriad proposals for legislative restrictions, from peremptory challenge recusals to excision of whole categories from jurisdiction. See *supra* 12n; *New York Times*, May 16, 1982, 1, 58. If, to avoid embarrassment, appellate courts silently condone egregious partiality, the high regard needed to resist mounting pressures for legislatively imposed remedies would be appreciably lessened. On the other hand, if the courts enforce the law, even when painful because they are the object of that enforcement, the prestige required to resist current challenges to their authority can only be greatly augmented.

F. UNDISTURBED, THE JUDGMENTS BELOW WILL ERODE CONFIDENCE IN JUDICIAL PROCEDURES AS WELL AS IN APPEARANCE OF IMPARTIALITY. As shown, *supra* 13ff., for basic due process and justice, it is not enough that judges be impartial. They must so *appear*, since the

"appearance of evil is often worse than the evil itself."[28] So it is appropriate to weigh the appearances of the judgments below.

Two caveats. First, by definition, appearances are what can plausibly be *believed* true, regardless of actual truth. In suggesting appearances, petitioner does not claim they are true; the claim is that, given their critical import, the courts should consider what is plausibly as well as really true. Second, not only are the appearances plausible, they are supported by, and in turn support, respected legal commentators, experienced practitioners, and even judges.

Beyond suggesting pervasive partiality, *supra* 10, 23, the instant matter gravely erodes confidence in procedures adopted for efficient handling of mushrooming litigation. To preserve them and their benefits, abuses should be remedied fast and forcefully. Otherwise, the lay public and professionals will generalize any abuses to be typical, and demand total elimination of the abused rules. To avoid inferences that what occurred here is common, this Court should reverse precisely on the ground of intolerable departure from *accepted* and *usual* practice. S.Ct. Rule 17.1(a).

(1) *Same-Judge Remands.* This facet of the individual assignment system is viewed as furthering efficiency, with which petitioner has no quarrel. He asks only that this be weighed against the impression here that all Jackson derived from his prior "successful" appeal was the Judge's resentment. *Supra* 2, 15. Left standing, the judgments below will erode confidence in the entire appellate process by creating (a) a belief that judges *generally* cannot cope with appellate control and *always* resent reversal; (b) fear in "victorious" appellants that they are going to be subject to retribution from the same judge;[29] and (c) serious public skepticism about *all* same-judge remands.

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28. *Potashnick*, *supra* 17n, 609 F.2d 1111n.8. Cf. *supra* 20n; A757-9. One of the main objectives of the 1974 §455 amendments was to foster appearance of impartiality, *supra* 17. Even the D.C. Circuit has accepted this, at least in theory. *U.S. v. Heldt*, *supra* 18, 668 F.2d at 1271. But that Circuit, the instant matter shows, is unwilling to put its theory into practice.

29. Cf.: The winning "lawyers may be pleased with the reversal, but there is a hitch . . . . [the same judge] will hear the case again." "Hasty Judge Gets Rebuked," *American Lawyer*, May 1982, 23. Even judges concede this fear's validity. Devitt, "Ten Commandments for the New Judge," 65 *A.B.A. J.* 574, 575 (1979); *Bartels*, *supra* 12n., 68 *A.B.A. J.* at 451.

One remedy is automatic remand to a new judge."[30] However, confidence in same-judge remands can be preserved by swift reversal/recusal at any hint of resentment of appellate criticism. *See Holland, supra* 15 (5th Cir), with which the judgments below clearly conflict.

(2) *No-Reason Affirmance.* This has been termed "uniformly condemned by commentators, lawyers, and judges."[31] Yet is is said to be acceptable "in appropriate cases," but "certainly not . . . encouraged in other than clearly deserving cases." Comment, 1973 *Wash. U.L.Q.* 257, 272. Whether or not *ever* justified to save court time, this case is not "appropriate" and, as a textbook example of the criticisms, it adds ammunition to those who would wholly abolish no-opinion decisions.

Thus, any opinionless decision made "because the court was unwilling to expose itself to criticism for an erroneous or unjust result clearly constitutes an abuse of the court's power, subordinates justice to speed, and subverts needed improvements to illegitimate ends." *Id.*, at 272-3. Also, a court "might use this . . . procedure to duck issues [or] avoid making troublesome decisions," which "invites the losing litigant to

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30. Judge Bartels, who opposes peremptory challenges, proposes instead "that on reversal or grant of a new trial, the case should be referred to a judge other than the judge who initially tried it." *Id.* Cf., e.g., Rule 18 (7th Cir.); Rule 8(i)(D. Mass.); Rule 2(d)(3) (E.D.N.Y.); *U.S. v. Robin*, 553 F.2d 8, 10-11 (2d Cir. 1977) (*en banc*) (quoting Justice BLACKMUN on "futility" of court "merely marching up the hill only to march right down again").

31. Reynolds and Richman, "Non-Precedential Precedent," 78 *Columbia Law Rev.* 1167, 1174(1978). Cf.: Comm. on Revision of Federal Court Appellate System, *Structure and Internal Procedures*, 67 F.R.D. 195, 256 (1975) (contra due process; lawyers see "risk of harm to public confidence in the judicial system"); R.L. Stern, *Appellate Practice in the U.S.* (1981) at 485 ("fundamental principle that appellate courts should state the reasons for their decisions"); P.Carrington, D. Meador, M. Rosenberg, *Justice on Appeal* (1976) at 10 ("unreasoned decision has very little claim to acceptance") 32 ("judgment affirmed" is "cryptic . . . imperious"); Note, 63 *Cornell L.R.* 128, 134 (1977) (D.C. Circuit Rule 13(c), in judgments here, "the most cryptic").

This Court has held a written statement of reasons is vital to rudimentary due process. *Morrissey v. Brewer* and *Goldberg v. Kelly*, *supra* 14, 408 U.S. at 489 and 397 U.S. at 267, 271.

suspect . . . judgment through impermissible means." 78 *Columbia L.R.* at 1175. As Judge Merrill (9th Cir) says: "Judges should not resort to this approach . . . to reach a result that they cannot satisfactorily explain." Query, 64 *Judicature* 435, 471 (1981).

These criticisms well apply here; the judges did not even try to explain how they could affirm discovery they strongly condemned or to justify what the trial judge said and did. While some cases may indeed not be important enough to use valuable court time writing about, the instant context demonstrates other cases are *too important*.

Although this section treats appearances, there is no doubt of the profound import of opinion absence here. Defendants themselves termed Jackson's recusal claims "serious" (Case 1: Dec. 1979 Opposition to summary reversal motion, at 5). Judge Bartels says bias and prejudice is a "serious charge" and "it only seems fair" to require a supporting affidavit. *Supra* 12n, 68 *A.B.A. J.* at 451. But it is equally "fair," when the charge is rejected, for the court to say why. As Judge Adams (3d Cir) observes: "refusal to explain . . . denial of a motion to recuse may itself contribute to an appearance of judicial bias." *U.S. ex rel. Perry v. Cuyler*, 584 F.2d 644, 652n (1978, dis.).

So it plausibly appears, the charges here are too serious, too distressing and too well-supported to discuss. This case gives no-reason affirmances a bad name; and it should be made clear that the practice is only to be used to save time, but not abused to save face.

(3) *Other Procedures.* This Court once noted that the recusal "remedy by appeal is inadequate. It comes after . . . prejudice . . . has worked its evil, and a judgment of it in a reviewing tribunal is precarious. It goes there fortified by presumptions. . . ." *Berger, supra* 13, 255 U.S. at 36. The instant matter is a classic and ironic illustration. In the prior Case 1 appeal, the Circuit warned of the "erroneous impression that lawyers protect other lawyers at the expense of everyone else" (46a). Here, it *appears*, so far, that "Judges protect other judges. . . ."

It might be argued, this is negated by the prior appeal's strong criticism of the trial judge, *supra* 2. But the opposite is

proven, for, it appears, when abuse and unfairness cross from mistake to misconduct, appellate judges are *less*, not more, willing to take corrective action. To be impartial is a judge's very *raison d'etre;* to say even strongly, he made a mistake is no problem (that's an appeals judge's job), but to doubt his impartiality may be asking too much of an appellate court.

So, left standing, the judgments give appearances inimical to confidence; e.g., that it is not proper for appeals judges to pass upon neutrality of colleagues they see daily, and this delicate issue should be transferred to a faraway venue. If judges are reluctant to rule themselves unfair, *supra* 11-12, they appear little less loathe to say this about fellow judges, even if on lower courts."[32]

This applies *a fortiori* where, as in the D.C. Circuit, appellate findings of trial judge misconduct appear limited by location of every single trial and appeals judge in the same courthouse (the instant trial judge is on the 4th floor and the circuit on the 5th). This is reinforced by regular temporary assignment of trial judges to appellate panels, making trial judges working colleagues of their nominal superiors. In the instant context, this promotes the cynical appearance that appeal to a judge's colleagues and friends is futile, for social and working relationships take precedence over recusal.

This matter surely supports this Court's *Berger* finding of "precarious" review after prejudice "has worked its evil." Unwillingness to recuse led the appeals judges here to affirm overt manifestations of bias, e.g.: (a) anti-pro se hostility; (b) abusive, irrelevant discovery they openly excoriated; (c) summary judgment contra accepted, usual principles.

II. THE JUDGMENTS BELOW VIOLATE SUPREME COURT DECISIONS AFFIRMING THE FUNDAMENTAL RIGHT TO *EFFECTIVE* ADVOCACY AND ACCESS TO THE COURTS.

In federal courts, "the right of self-representation has been protected by statute [28 U.S.C. §1654] since the beginnings of our nation." *Faretta v. Cal.*, 422 U.S. 806, 812-13 (1975). This is now a constitutional right. *Id, passim.* Moreover, where a

32. Comment, *supra* 11n, 7 *Seton Hall* 626, 637; Note, *supra* 11n, 45 *Fordham* at 159; Judge R. Sullivan, *Goodbye Lizzie Borden* (1974) at 199 ("I find it uncomfortable to criticize his judicial action . . . nor do I charge . . . bias or prejudice").

fundamental right exists, "meaningful" exercise thereof must be allowed. Cf. *Bounds v. Smith*, 430 U.S. 817, 828 (1977).

Against these tenets, the instant judge's exact qualifying words merit stress: "There is nothing worse on God's earth than a pro se litigant, *unless he's completely ignorant* and the other . . . knows everything" (53a). Of course, Jackson does not claim to "know everything." However, he clearly is far from "completely ignorant." He is not a hapless resourceless litigant, and seeks no sympathy or favorable court rulings as one. He is highly educated, with a Ph.D. in political science, which he has taught.

So the anomalous result below is that the right of self-representation, held by this Court to be both constitutional and statutory, only belongs to the "completely ignorant" litigant eager to be completely guided by the trial judge. By contrast, educated litigants like Jackson are to be barred from *meaningful* access to court, when they must represent themselves after being severely burned by grossly negligent and deceptive lawyers (allowed by sympathetic courts to practice uninhibited by discipline, 42a-43a, 53a). When a pro se litigant is able to represent himself effectively,[33] that is to be held against him. This is a further anomaly.

One of the reasons this Court has often reviewed contempt cases, *supra* 13-15, is to guard a client's right to effective advocacy. See *Sacher v. U.S.*, 343 U.S. 1, 13 (1952) (this Court will "unhesitatingly protect counsel in fearless, vigorous and effective" advocacy). If the pro se right is to be anything but a second class sham, this Court should proclaim the educated pro se also has a right to fearlessly and effectively advocate his position without incurring the wrath of the trial judge.[34]

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33. The decision resulting from Jackson's successful prior appeal in Case I has been cited a number of times. He also has obtained a published opinion in the New York courts in his case against his ex-lawyer. So the refusal of the Court of Appeals this time to discuss his extensive papers was not due to a bumbling pro se's inability to submit meritorious and readable papers worthy of discussion. Cf. *supra* 25-26.

34. One source of the judge's anger was that Jackson did what any advocate would be expected to do; he made objections to protect his rights and preserve the record. Cf. 57a.

III. THE COURT OF APPEALS SANCTIONED AN EGREGIOUS DEPARTURE FROM USUAL, ACCEPTED DISCOVERY PRACTICE ESTABLISHED BY THIS COURT AND EVERY CIRCUIT.

Case 2 was dismissed solely for "refusal" to depose 12 days *after* the dismissal order (22a), which made no mention of Jackson's objections to all discovery (A863-9), including documents and interrogatories due before the dismissal. *Supra* 1n. (Each of the orders underlying and noted in the dismissal order did mention all discovery: 23a-26a.) At oral argument, the appeals court showed full awareness: "You [defense counsel] are taking part of [Jackson's] objections . . . as a basis for the justification of the dismissal and ignoring the other part of the *same* set of objections. . . ." (14a).

Yet the court affirmed just the kind of unsupervised, abusive and irrelevant discovery, *supra* 4-6, that has been often criticized, e.g., by Chief Justice BURGER, Justice POWELL and the whole Court.[35] Writing for this Court in *Herbert v. Lando*, 441 U.S. 174,176,177 (1979), Justice WHITE, noting "mushrooming litigation costs" due to "undue and uncontrolled discovery," stressed that

> the requirement of Rule 26(b)(1) that the material sought . . . be "relevant" should be firmly applied, and the district courts should not neglect their power to restrict discovery ". . . [to protect] a party . . . from annoyance, embarrassment, oppression or undue burden or expense. . . ." Rule 26(c). . . . judges should not hesitate to exercise appropriate control over the discovery process.

Justice POWELL also stressed: "the initial inquiry in enforcement of any discovery request is one of relevance."[36] *Id.*, at 179 (conc.).

35. Chief Justice BURGER and Justice POWELL are quoted in the Appellant's Brief, Case 2, at 56. That Brief to the appeals court discussed discovery at length, at 56-67.

36. This is accepted by all circuits; even the D.C. Circuit, 8 days before the dismissal, quoted *Herbert* and added: "the district courts are to accord great weight to . . . relevancy . . . ." *Chagnon v. Bell*, 642 F.2d 1248, 1266 (1980).

But the trial judge not only failed to "exercise appropriate control" to inquire into and require relevance, especially of privileged matter demanded (see *supra* 5; Ct. Ap.Br. 62-66); he issued a *sua sponte* order (26a) compelling this discovery before there was any motion to do so, or any failure or refusal to make discovery (cf. Ct.Ap.Br. 45,14,17-18). Cf. F.R.Civ.P. 37(a)(2). As this Court said in *Hickman v. Taylor*, 329 U.S. 495,509 (1947):

> All of this was ordered without any showing by [respondents], or any requirement that [they] make a proper showing of the necessity for the production of any of this material or any demonstration that denial of production would cause hardship or injustice.[37]

And "all of this" was affirmed by appeals judges who condemned the discovery in the strongest possible terms. *Supra* 6-7. Hence, this Court should exercise its supervisory power, to make clear its discovery decrees cannot be knowingly flouted at will and appeals courts cannot affirm what they clearly consider egregious.

IV. THE SUMMARY JUDGMENT, AND AFFIRMANCE WITHOUT STATED REASON, WAS ANOTHER EGREGIOUS DEPARTURE FROM USUAL, ACCEPTED PRACTICE; E.G., BY CONSTRUING THE *MOVANT'S* PAPERS AS TRUE AND NOT CONSTRUING THE OPPOSING AFFIDAVITS AT ALL.

It is hornbook law, a summary judgment opponent's papers must be accepted as true and given the benefit of the

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37. On appeal, they did try to justify, claiming poverty and using conclusory adjectives that did not convince the court, e.g., "extremely limited," "reasonable" (15a, 20a, *supra* 6). See *supra* 5n on the claim Jackson objected too late. They denied demanding the N.Y. plaintiff come twice in one week to the Washington office of defense counsel having a N.Y. office, arguing he could have sent document copies of Washington (20a; their Ct.Ap.Br. 18-19). In fact, from Oct. 30, 1979 to July 11, 1980, they insisted on seeing in Washington "the *original and* any copy" of the documents (A724), despite repeated protests (A740, 743-6, 795, 800-01, 825b-c, 845). On Jan. 27, 1982, Jackson's motion to file his Reply Brief in Case 2 was denied because it arrived 3 days after it would have if timely mailed. That brief, in the record as part of the denied motion to file, deals at length with defendants' discovery rationale.

most favorable inferences. Cf. *U.S. v. Diebold*, 369 U.S. 654 (1962). Yet, in awarding Case 1 copyright summary judgment, the judge wrote: "Jackson . . . contends . . . his labor was unfairly appropriated. This is *wholly unsupported by the evidence*, which reflects . . . Defendant . . . performed . . . extensive research. . . ." (32a). All that "evidence" was affidavits of defendants and of affiants allegedly interviewed by a defendant.

To grant summary judgment on affidavits of interested parties is in direct conflict with *Sartor v. Arkansas Nat. Gas Co.*, 321 U.S. 620, 628 (1944) (credibility a fact question for jury). Also, Jackson *proved* at least one affidavit of the alleged interviewees was *false*, in swearing that statements were made in an interview that were shown to be from senate debate 6 months earlier; Jackson swore he had called that debate, and its significance, to the attention of a defendant before the alleged interview.[38] (See Jackson's Case 1 Ct.Ap.Br. at 18,32; Rep.Br at 23.)

Defendants' Ct.Ap.Br. at 43n, confirmed that the judge "rejected the truth" of Jackson's claim. They called this "proper" but nothing could be more improper—except the grant of summary judgment to a party that *altered evidence*, did not deny it, and offered two totally different explanations on two different occasions. This carries the strongest inferences of consciousness of guilt. See Jackson Ct.App.Br. 24-25; Rep. Br. 29-30.

Defendants also, by their own account, deceitfully procured access to Jackson's materials *three* distinct times, which also carries strong inferences in his favor. Ct.Ap.Br.25-27; Rep.Br.28-29.

Against all these inferences (and more: Ct.App.Br.24-28), the summary judgment violated the most elementary tenets (Ct.Ap.Br. 21-22), and rewarded a party engaging in a pattern of deceit, contra *Glus v. Brooklyn Eastern Terminal*, 359 U.S.

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38. It is not an issue on this petition if defendants had a right to use the debate even though they learned of it from Jackson by deceit, as he claims. (Ct. Ap.Br. 48-54; Rep.Br. 22-25.) The point here is that unless a senator is likely to have repeated in an interview word-for-word what he said on the floor 6 months earlier, his affidavit was demonstrably false.

231, 232-3 (1959) (deeply rooted maxim that "no man may take advantage of his own wrong . . . . applied in many diverse classes of cases").

The judge resolved genuine material issues of fact, and wrongly (Ct.Ap.Br. 30-37). E.g., he said that, apart from two copied sentences, "there is no similarity" at all between the works in issue (31a). This Court is entreated to examine just one of myriad plagiarism examples furnished by Jackson, *infra* 36a, and decide for itself if "there is no similarity" whatsoever.

8 days *after* his "final" summary judgment order, the judge denied complaint amendment to allege facts Jackson discovered for the first time from defendants' summary judgment papers (35a). This denial was wholly contrary to the liberal amendment policy of this Court. *Foman v. Davis*, 371 U.S. 178,182 (1962). Cf. Ct.Ap.Br. 54-62.

Finally, but for quotation of a mere two plagiarism examples out of over 100 submitted (cf. 33a with A285-318), the trial judge gave no evidence at all that he ever even considered Jackson's papers and there is ample evidence to the contrary (Ct.Ap.Bf.28-30). The judge's opinion (29a-34a) made *not one* reference to Jackson's 7 opposing affidavits, 97 pages of legal argument, 13-page material issues statement and 28 exhibits. (Appendix Refs. at Ct.Ap.Br. 20).

An American citizen thrown out of court without a trial deserves better than that. He should at least be told why his statements are wrong.

CONCLUSION

For the foregoing reasons, certiorari should be granted.

Respectfully submitted,

LESTER JACKSON
2250 83rd Street
Brooklyn, New York 11214
(212) 256-2052, 298-5587

August 16, 1982

APPENDIX 1—COURT OF APPEALS JUDGMENTS AND REHEARING DENIALS

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 80-2135 September Term, 1981

Lester Jackson, Appellant

v.

The Washington Monthly Company, et al.

Civil Action No. 79-01400
United States Court of Appeals
for the District of Columbia Circuit
FILED FEB 5 1982
GEORGE A. FISHER
Clerk

Appeal from the United States District Court for the District of Columbia.

Before: Edwards, Circuit Judge; McGOWAN, Senior Circuit Judge and OSCAR H. DAVIS*, Judge, United States Court of Claims

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel. While the issues presented occasion no need for an opinion, they have been accorded full consideration by the Court. *See* Local Rule 13(c).

On consideration of the foregoing, It is ordered and adjudged by this Court that the judgment of the District Court appealed from in this cause is hereby affirmed.

Per Curiam
For the Court
s/ George A. Fisher
George A. Fisher
Clerk

*Sitting by designation pursuant to 28 U.S.C. §293(a).

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 79-2264 September Term, 1981

Lester Jackson, Appellant

v.

The Washington Monthly Company, Charles Peters, John Rothchild.

Civil Action No. 749-72
United States Court of Appeals
for the District of Columbia Circuit
FILED FEB 9 1982
GEORGE A. FISHER
Clerk

Appeal from the United States District Court for the District of Columbia.

Before: Edwards, Circuit Judge; McGOWAN, Senior Circuit Judge and OSCAR H. DAVIS*, Judge, United States Court of Claims

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel. While the issues presented occasion no need for an opinion, they have been accorded full consideration by the Court. *See* Local Rule 13(c).

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Per Curiam
For the Court
s/ George A. Fisher
George A. Fisher
Clerk

*Sitting by designation pursuant to 28 U.S.C. §293(a).

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 80-2135 September Term, 1981

Lester Jackson,

Appellant

v.

The Washington Monthly Company, et al.

Civil Action No. 79-01400
ARGUED: 1-26-82

BEFORE: Edwards, Circuit Judge, McGowan, Senior

Circuit Judge, Oscar H. Davis*, Judge, United States Court of Claims

ORDER

On consideration of appellant's petition for rehearing, filed March 8, 1982, it is

ORDERED by the Court that the aforesaid petition is denied.

Per Curiam
FOR THE COURT:
GEORGE A. FISHER, Clerk
BY: s/ Robert A. Bonner
Robert A. Bonner
Chief Deputy Clerk

United States Court of Appeals
for the District of Columbia Circuit
FILED MAR 19 1982
GEORGE A. FISHER
CLERK

*Sitting by designation pursuant to Title 28 U.S.C. §293(a).

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 80-2135 September Term, 1981

Lester Jackson,

Appellant

v.

The Washington Monthly Company, et al.

Civil Action No. 79-01400
ARGUED: 1-26-82

BEFORE: Robinson, Chief Judge, Wright, Tamm, MacKinnon, Robb, Wilkey, Wald, Mikva, Edwards, Ginsburg, Bork, Circuit Judges, McGowan, Senior Circuit Judge, Oscar H. Davis*, Judge, United States Court of Claims

ORDER

Appellant's suggestion for rehearing *en banc* has been circulated to the full Court and no member of the Court has requested the taking of a vote thereon. On consideration of the foregoing, it is

ORDERED by the Court *en banc* that the aforesaid suggestion is denied.

Per Curiam
FOR THE COURT:
GEORGE A. FISHER, Clerk
BY: s/ Robert A. Bonner
Robert A. Bonner
Chief Deputy Clerk

United States Court of Appeals
for the District of Columbia Circuit
FILED MAR 19 1982
GEORGE A. FISHER
Clerk

*Sitting by designation pursuant to Title 28 U.S.C. §293(a). Circuit Judge Bork did not participate in this order.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 79-2264 September Term, 1981

Lester Jackson,

Appellant

v.

The Washington Monthly Company, Charles Peters, John Rothchild

Civil Action No. 749-72
ARGUED: 1-26-82

BEFORE: Edwards, Circuit Judge, McGowan, Senior Circuit Judge, Oscar H. Davis*, Judge, United States Court of Claims

ORDER

On consideration of appellant's petition for rehearing, filed March 11, 1982, it is

ORDERED by the Court that the aforesaid petition is denied.

Per Curiam
FOR THE COURT:
GEORGE A. FISHER, Clerk
BY: s/ Robert A. Bonner
Robert A. Bonner
Chief Deputy Clerk

United States Court of Appeals
for the District of Columbia Circuit
FILED MAR 23 1982
GEORGE A. FISHER
CLERK

*Sitting by designation pursuant to Title 28 U.S.C. §293(a).

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 79-2264 September Term, 1981

Lester Jackson,

Appellant

v.

The Washington Monthly Company, Charles Peters, John Rothchild

Civil Action No. 749-72
ARGUED: 1-26-82

BEFORE: Robinson, Chief Judge, Wright, Tamm, MacKinnon, Robb, Wilkey, Wald, Mikva, Edwards, Ginsburg and Bork, Circuit Judges, McGowan, Senior Circuit Judge, Oscar H. Davis*, Judge, United States Court of Claims

ORDER

Appellant's suggestion for rehearing *en banc* has been circulated to the full Court and no member of the Court has requested the taking of a vote thereon. On consideration of the foregoing, it is

ORDERED by the Court *en banc* that the aforesaid suggestion is denied.

Per Curiam
FOR THE COURT:
GEORGE A. FISHER, Clerk
BY: s/ Robert A. Bonner
Robert A. Bonner
Chief Deputy Clerk

United States Court of Appeals
for the District of Columbia Circuit
FILED MAR 23 1982
GEORGE A. FISHER
CLERK

*Sitting by designation pursuant to Title 28 U.S.C. §293(a). Circuit Judge Bork did not participate in this order.

APPENDIX 2—Transcript, Jan. 26, 1982 Oral Argument in No. 80-2135 (Case 2) by Lester Jackson, Appellant, and Anthony F. Essaye, Counsel for Appellees

[3] MR. JACKSON: This is an appeal from a dismissal involving alleged non-compliance with three underlying orders. And this Court most recently in the *Black Panther Party versus Smith* held that where there is dismissal for non-compliance with an underlying order, the underlying orders must be scrutinized for validity. And I am entitled to that. I maintain that the underlying orders were not valid, none of them were valid, in that they involved what I would allege was a judge who was not impartial and therefore not authorized to sit on the case. They compelled discovery which was improper, and they did not provide enough time for me to do what I had to do in addition to providing inequitable time to the other side while denying me any time.

In *Chagnon versus Bell* at 642 F. 2nd 1266, this Court held that discovery should be carefully supervised by the district court to guard against abuse and to assure relevance. Here the discovery sought against me involved considerable abuse. For one thing, how can people being sued for copyright infringement demand from the copyright plaintiff that he submit to them those of his unpublished manuscripts that they have not yet seen? I [4] would submit that there should at least be a requirement by the district court to show some sort of reason for that. On top of that, they desired to know all legal and administrative proceedings dating back to January, 1968, apparently including parking tickets, that I was involved in. On top of that, they demanded that notwithstanding that the defense counsel and one of their attorneys have an office in New York City where I reside, that I should come down to Washington twice in one week. In their brief they say they never demanded that I come to Washington twice

in one week, that I could have mailed them copies of the documents requested.

However, if you look at their documents request, it expressly states that documents includes all originals and—not or, but and—any copy. So, they wanted the original and any copy I had. And they wanted it produced for inspection in their Washington office. And I submit that is not proper, especially in view of the fact that I did not even choose the Washington forum and the defendants opposed the Washington forum. And there is a whole line of cases—

THE COURT: But you chose it in the sense that you brought this here after the New York courts refused to entertain your suit.

MR. JACKSON: I had no choice but to bring it here. I mean, this is his only forum available after—

THE COURT: You could have not brought suit at all. You had the choice of either bringing a suit or—it is [5] not as if you were sued. They did not sue you.

MR. JACKSON: Yes, but the cases that I have cited indicate that that still is no choice if you feel you have legitimate grievances. On top of that, they also sought without even being required to show why again the unpublished manuscript, again the—

THE COURT: I hope you are going to reach the point that the trial judge dismissed for your failure to appear at a deposition. You are talking about production of records, but he did not dismiss on that ground. He dismissed on your failure to—he warned you. And as I read the record, some days before you sent him a letter which said explicitly, "I will not appear until my recusal thing is finally decided" or unless the judge recused.

* * *

MR. JACKSON: What I objected to was the entire discovery tactics.

THE COURT: You said the discovery includes the deposition and you were not going to appear. I am saying this because you claim that he issued his order before the due date of the deposition, which was September 4th. ***

[6] Is there not something like antic patory repudiation; if you tell him, "I am not going to appear," does he have to wait until September 4th?

MR. JACKSON: Well, one can—

THE COURT: You might change your mind.

MR. JACKSON: —change one's mind. I do not know that I would have. I would think that the fundamental issue was recusal. I think on the record in this case there is no question that the district judge at least his impartiality might reasonably be questioned, and I would go further than that. How can one issue an order *sua sponte* denying one time extension for a pro se plaintiff after allowing the defendants to answer the complaint two months late, when they are represented by the 35th largest law firm in the country, and then in the very order denying an extension of time to the plaintiff he granted the defendants another two months, all the time they wanted? He even at one point allowed them an extension of time to oppose a motion for an extension of time. And that is in this case. I would submit that no one should have to appear before a judge who says that there is nothing worse on God's earth than the person before him.

[7] THE COURT: Well, you know, it is not an uncommon thing—and I have been a judge almost 20 years—to find pro se litigants hard because they are not lawyers.

MR. JACKSON: Well, I have done my best.

THE COURT: I know, but you are not a lawyer.

MR. JACKSON: I know I am not a lawyer. But then if that is the attitude, why not just bar pro se litigants from court?

THE COURT: No, no.

MR. JACKSON: It seems me either-that either one has to be given an oppor—

THE COURT: You can have a perfectly valid proposition to a non sequitur extreme. That is, we do have to deal with pro se cases. For one reason they do not want or cannot have lawyers. But very frequently—most frequently, I would say—they are difficult not in the sense of being cantankerous, but because they are not lawyers.

MR. JACKSON: It goes beyond that. The judge expressed prejudgment of both the copyright case and this case at the hearing before which I appeared. He said my former lawyer was a sucker to take the case before—not after, but before—he saw a shred of evidence. When he restored the case, he did not say the evidence merits restoring it. He said, "There is no way I can keep you from having it restored." And then in the very order of restoration he directed the defendants to make a motion for summary [8] judgment by a date certain and also declared that he thought the facts were not much in dispute, again before seeing any evidence on the record. When defense counsel said, "I am almost finished," he said, "Do not hurry at all. We can always come back tomorrow if we do not finish tonight."

When I said I would like to come back tomorrow, he said, "No, I have other things to do tomorrow. We are going to finish tonight."

I know, Judge Davis, that you refer to your 20 years of experience. But with all due respect, the recusal standard is not the superior insight of a judge into the problems of his colleagues, but what the average person on the street would think of this.

THE COURT: I do not think that is the standard. I do not think it is the average person on the street. I think it is a reasonable position.

MR. JACKSON: Would a person outside the judicial

process reasonably question? And the recusal statute, 28 U.S.C. 455(a), says: whether the impartiality might reasonably be questioned. And I have cited numerous cases showing that it is what an average reasonable person
[9] might conclude.*** Judge Kaufman has said no one should feel that he had been victimized by the judge. And I will never feel otherwise because I was not treated fairly in absolute terms. There were prejudgments in addition of course to abuse. I find nothing to indicate that he mentioned any of the arguments I ever made.***

MR. ESSAYE:*** This case was brought by Mr. Jackson in May of 1979. We answered. We then proceeded to seek discovery with the hope of being able to move rather expeditiously to bring summary judgment. I think you can see the nature of the allegations against us. We felt that it was our obligation and need to move with all reasonable speed and see if we could dispose of the case.

THE COURT: But you did ask for everything under the sun in discovery.

THE COURT: The question I would ask you, counsel, if you were on the other side of the case, it surely would have crossed your mind to suggest to the judge by motion that the discovery request was burdensome and excessive, would it not?***

[10] MR. ESSAYE: I think it may have crossed my mind. But I, being Mr. Jackson, did something different, which I think changed the whole nature of the case. And that is he sent a letter to us and to the court saying that he requested we postpone any discovery for five to six months or at least until such time as his recusal motion was finally resolved. At that point I think in all fairness he made a decision that he was not going to go forward with this case or continue with this proceeding until either Judge Robinson was removed or that issue at least was finally determined.

THE COURT: Judge Robinson never ruled on his objections.

MR. ESSAYE: At that point, Your Honor, he simply informed the judge that he was going to proceed with a motion for recusal and asked that no discovery be permitted. I mean, he never at any point came to us or came to the judge and said, "I have all these documents." I mean, when you look at the—

THE COURT: There are no itemized objections in the record?

MR. ESSAYE: No sir.*** As far as I am aware, there were never any itemized objections submitted to the court or to us as counsel. And, going back to the issue of being [11] unduly—

THE COURT:...because he is not a lawyer. He wrote a letter to the judge, which lawyers should not do. And in his letter, did he not itemize?

MR. ESSAYE: At a very late point. In this final statement, Your Honor, that you were making reference to, in August.***He wrote a lengthy statement at that point in which he said: I will not participate in this proceeding further. And he went on then to explain his concern with some of the interrogatories. But this was after ten months.***

THE COURT: In March of 1980 did he not ask for a protective order?

MR. ESSAYE: He asked for a protective order that he would not have to proceed with any discovery whatsoever, pending the resolution of the recusal issue. In all fairness, Your Honor, I think he was taking a flat position that he was not going to participate in this case in any way or provide anything to us whether it comes from a deposition, provide any documents whatsoever, until the recusal matter was resolved to his satisfaction. The case came up here, as you know, on mandamus. The mandamus petition was denied. A suggestion for rehearing ws then filed [12]

en banc by Mr. Jackson. That was denied. It was only after all that had occurred that the district court issued its final order and said: We have been through all this. We have to proceed with the case. Counsel should renotice his deposition and reissue the documentary discovery. And, Mr. Jackson, if you continue not to comply, continue to refuse any sort of discovery, I am going to have to dismiss the case.

And I think at that point the fat was in the fire. And the position taken now by Mr. Jackson is that he still did not have to, that he had a right, a constitutional right, basing it on the Black Panther Party case, not to proceed. And I would say that what he was really doing was taking the law into his own hands and saying: The judicial system is not providing me the relief I believe I should have. I personally have made a decision that this judge is biased. And I am just not going to continue in this case until that issue is resolved. And if the judicial system does not afford this to me, I am not going to go along with it.

And I think, even with a pro se plaintiff, that that particular position just simply cannot be taken. That really is definance of the system.

[13] THE COURT: You are taking part of that set of objections and using it as a basis for the justification of the dismissal and ignoring the other part of the same set of objections which said the deadlines were unfair...order was burdensome, was broad. And can you suggest that the district court judge could not have said to a pro se litigant: Now, look, here is what I understand you to be saying. One is you are telling me that you are not going to proceed because you do not like me or I am unfair or biased. That has been decided. So far as I am concerned, that matter is over with. And if you continue to resist, you will be out of court. As to your questions on the discovery being burdensome, the deadlines being unfair, excessive, here are my rules, A, B, C, and D. I have now responded to all of your

concerns. It is your choice. If you do not now respond to my order, I will dismiss.

You mean to say a district court judge cannot settle out a pro se's objection, especially when you are telling me you are so willing to have the court look at one part of his objection and use that as a basis for dismissal?

MR. ESSAYE: I think the Court could analyze the case, Your Honor. If you look at the case and what is being claimed here, fraud on our part. The nature of the discovery, I think the Court itself can understand, is extremely limited. I grant you you have to give pro se litigants some flexibility and that they may not understand the exact procedures and how you raise objections and claims. But I think we went on for nine months, Your Honor, in all fairness.

THE COURT: Did you ask for any extensions during [14] that period?

MR. ESSAYE: We may have asked for the one extension on the recusal issue. He certainly asked for a number of extensions and received them. He was asked to file his recusal motion in November. He filed it in January, and the judge did not take issue with that. I think in fairness the whole issue of us getting better treatment than he is just not the case.

THE COURT: ..I do not think anyone got any better treatment than anybody else, do you?

MR. ESSAYE: He was allowed for ten months, Your Honor, to prevent us, in a sense, from getting any discovery whatsoever and—

THE COURT: Are you raising a concern with respect to recusal?

MR. ESSAYE: He raised an objection on the recusal, and the judge made a determination that and in the meantime the case should go forward. The plaintiff decided he did not agree with that and refused to go forward.

THE COURT: He objected to it. He felt that that

would be unfair...that is certainly very understandable,
[15] that someone who feels strongly about a recusal question might say: I think it would be unfair to proceed if I think you are going to treat me unfairly; let us get an appeal on that question.

MR. ESSAYE: I understand that up to a point.

THE COURT: And the district court stayed its hand, did it not?

MR. ESSAYE: And the district court did stay its hand twice, I think with some deference to a pro se plaintiff. But there came a time—

THE COURT: Then why do we not wash that period out? We are starting from the period in July.

MR. ESSAYE: That is fine with me***I think that is background though that is somewhat relevant, that the district court did stay its hand and we stayed our hand. And everybody was there in July when this Court declined to have the en banc review and the decision was there. And I think I would like to refer you to the *Hepperle* case that is cited in our brief because it is a very conparable case, a recent case in the Fifth Circuit, where—

THE COURT: I read it.

MR. ESSAYE: You have read it, okay. The facts are very, very much the same.

THE COURT: But none of these cases are precisely the same.

MR ESSAYE: I am sure of that. I am sure of that.

[16] THE COURT: There was a pro se plaintiff, and he also asked for the recusal of the judge and so forth. But each case is a little different.

MR. ESSAYE: I think what this really comes down to in my view—and I think we have been very patient here as defendants. We ourselves are saddled with a pro se plaintiff. The judicial system is saddled with a pro se plaintiff. But I think what he is really saying here is that I have some sort of constitutional right to insist on my position if I feel

the judge has been treating me unfairly. And I am going to stand on that. And you, Judge Robinson, you are going to have to dismiss this case. I am not going to proceed.

I mean, he was really telling that to the judge. And I think the judge had no alternative but to dismiss the case under the circumstances.

THE COURT: That is what he said in the late August—

MR. ESSAYE: Yes.

THE COURT: —statement, which I read. I am not absolutely certain that the judge had a right to be taken at his word.

MR. ESSAYE: I think one other point on this is that this is a knowing and intelligent pro se plaintiff, as you can see by the lengthy submissions in this case. I think he knew very well what he was doing. I think he took this, if you will, on a matter of principle. I think he was dead wrong. And I think Judge Robinson was right in the reaction he [17] took, and that this Court can very properly affirm that decision without really on a review of the record feeling that this is the plaintiff whose real objections were that this was too burdensome, that we had not made proper provision for his coming down and having his deposition taken here in Washington D.C., that those were the real issues on his mind that for the prior ten months had meant that he had not given us any discovery whatsoever. I really believe that a reading of the record will show that that is not what was going on. What was going on was to him a decision that if this judge was going to continue the case, he was not going to have any part of it. And I think that is not the way the judicial process can proceed.

THE COURT: In a case where the discovery was narrowly focused and tight and there were no issues, I suppose we could easily say what you are concluding. We could easily conclude it too, that is, that really he was focusing on something else. The problem is your discovery

was not narrowly focused and tight—and it was not clear that all which you were asking for was related to the cause of action. And certainly it was broad. And I think that as an advocate of some experience that if you were on the other side of the case, you would have asked for a more limited discovery. ...as you did. You can understand that.

MR ESSAYE: I can understand that, by all means
[18] Your Honor. I think that really was not was going on here. I do not think he has any real problem or had any problem in responding to the discovery. And I do not really think it was all that broad.

THE COURT: It was very broad. I mean, I did not read it, but the things that are covered are very broad.

MR. ESSAYE: But the real—if I could come back—I think the real issue is he was not interested in giving us anything, whether broad or narrow, whether coming down to a deposition or not.

THE COURT: ...you can put someone to the test when your request is legitimate. You cannot say that we are entitled to prevail under an incredibly broad request because you know he will not give anything.***

MR. ESSAYE: But I can assure Your Honor that in drafting the discovery request, we did not consider it unusually broad. We were not trying to set up a situation where the other side would say: I cannot—

THE COURT: I am not accusing you of...conduct..

MR. ESSAYE: I understand. I understand.

THE COURT: —because I cannot.

MR. ESSAYE: But I think that is very relevant, that when you look at what he said throughout this record, he
[19] really was not concerned with any of that. I mean, I think these are after-thoughts, in all fairness.

THE COURT: It is not unknown for a large, well-staffed law firm meeting either a single practitioner or a pro se plaintiff to try to inundate him in discovery.

MR. ESSAYE: I think that is clearly not the case

here, Your Honor. If you look at the nature of this case, and what we needed by way of discovery for a move for summary judgment, there would really be no purpose in our doing that. All we wanted was to make sure—we could have moved for a dismissal obviously. But it being a pro se plaintiff, what we needed to see is if he had any other allegations that could become issues of fact. That was simply taking his deposition, finding out what documents he might have to support this accusation that we somehow conspired to keep from him the notion that the Washington Monthly thought that he was not a good writer. That is the issue in the complaint.

THE COURT: It was not limited to that—

MR. ESSAYE: That is the gravemen of the complaint.

THE COURT: —at the moment. I do not know why you had to know all legal proeedings...

MR. ESSAYE: That was certainly what we had in mind, exactly. So, we thought through each of these and I must say, did not consider them burdensome at the time. And we were just met really with a stone wall, that he was not interested.*** [20]

REBUTTAL ARGUMENT OF LESTER JACKSON, APPELLANT, PRO SE

MR. JACKSON: ***in relying on three underlying orders, it is not a complete washout, in view of the fact that the time denials were always directed against me, never against the defendants. And the February 22nd order expressely denied a stay pending my mandamus petition, whereas on May 27th a *sua sponte* stay was ended pending the rehearing. If the stay was legitimate pending rehearing, why was not a stay legitimate pending the original hearing?

***

APPENDIX 3—MEMORANDUM OF APPELLEES IN REPLY TO A QUESTION RAISED BY THE COURT AT ORAL ARGUMENT, DATED JAN. 29, 1982

During the oral argument in this case earlier this week, the panel raised a question concerning the breadth of appellees' interrogatories and document production request and the possible motivation of appellees in filing them. Appellees filed six interrogatories and eight requests for documents in this case. We believe that these requests were reasonable, and that they fully conformed to the provisions of Rule 26(b) in that they sought information relevant to the substantive allegations in the complaint and to the claim for damages.

Moreover, this is not a situation where a "deep pocket" defendant was trying to overwhelm its adversary with burdensome discovery requests. The principal defendants are a magazine that is in a precarious financial condition having been through a Chapter XI proceeding, and its editor, Mr. Peters, who has had to make personal financial sacrifices in order to keep the magazine alive. Discovery was sought only to secure the information necessary to bring this matter to a close as soon as possible. Indeed, despite being subjected to what they consider to be both disparaging and frivolous allegations, appellees nevertheless offered in their July 11, 1980 letter to appellant to pay for appellant's document reproduction costs. Appellees were willing to do so in order to move the case along as expeditiously as possible.

Finally, we believe the record reflects that during the nine months prior to his August 16, 1980 filing with the District Court, appellant made only generalized objections to all discovery (*e.g.*, need for more time, objections to having to come to Washington, etc.). More importantly, a reading of appellants' earlier papers and his August 16, 1980 submission—wherein appellant finally came forward

with objections to specific discovery items—makes it clear that appellant had no intention of appearing for his deposition or making any discovery whatsoever unless or until the District Court Judge was removed from the case.

Under the above circumstances, we believe that the District Court properly exercised its discretion in dismissing the case.

[Leave to file foregoing document was denied Feb. 10, 1982, five days after the affirmance.]

Respectfully submitted,

/s/ Anthony F. Essaye

Anthony F. Essaye

/s/ Thomas M. Shoesmith

* * *

Attorneys for Appellees

APPENDIX 4—APPEALED DISTRICT COURT DISMISSAL ORDER IN CASE 2 AND ORDERS UNDERLYING DISMISSAL

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

LESTER JACKSON,

Plaintiff

v.

THE WASHINGTON MONTHLY CO., et al.,

Defendants

CIVIL ACTION NO. 79-1400

FILED

AUG 22 1980

JAMES F. DAVEY, Clerk

ORDER

Upon consideration of Defendant's Motion for the Sanction of Dismissal, which was effectively stayed by this Court's Order of July 1, 1980, Plaintiff's Statement Concerning Defendants' Discovery Notices, and the entire record herein, the Court notes that (1) twice prior to July 1 this Court Ordered Plaintiff to submit to oral examination; (2) Defendants submitted their Motion for the Sanction of Dismissal because Plaintiff had persistently refused to submit to oral examination or prosecute this litigation; (3) on July 1, 1980 this Court stayed Defendants' Motion, Ordered Plaintiff to submit to oral examination, and warned Plaintiff that his refusal to do so would result in dismissal of the instant litigation; (4) the Court tolerated Plaintiff's refusal to comply with the discovery request because he was litigating *pro se;* and (5) it is no longer in the interests of justice to permit Plaintiff to abrogate the Federal Rules of Civil Procedure. It is therefore by the Court, pursuant to Rules 37(b) and 41(b) of the Federal

Rules of Civil Procedure, this 22nd day of August, 1980

ORDERED, that the instant case be and hereby is DISMISSED with prejudice.

s/ Aubrey E. Robinson, Jr.
Aubrey E. Robinson, Jr.
United States District Judge

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

LESTER JACKSON,

Plaintiff

v.

THE WASHINGTON MONTHLY CO., et al.,

Defendants

CIVIL ACTION 79-1400
FILED
JUL 1 1980
JAMES F. DAVEY, CLERK

ORDER

Upon consideration of Defendants' Motion for the Sanction of Dismissal, the Court of Appeals' Denial of Plaintiff's Suggestion for Rehearing *En Banc* seeking a Writ of Mandamus, the Oppositions thereto, and the entire record herein, the Court noting that Plaintiff has persistently refused to appear for deposition, answer interrogatories, or produce documents, it is by the Court this 1st day of July, 1980,

ORDERED, that Defendants shall renotice their depositions, and resubmit their request for documents and answers to interrogatories; and it is

FURTHER ORDERED, that the Court shall dismiss the instant proceeding with prejudice pursuant to Rules 37(b) and 41(b) of the Federal Rules of Civil Procedure unless Plaintiff responds to Defendants' requests for documents and answers to interrogatories, and appears at his deposition as mandated by the Federal Rules of Civil Procedure.

s/ Aubrey E. Robinson, Jr.
Aubrey E. Robinson, Jr.
United States District Judge

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

LESTER JACKSON,

Plaintiff,

v.

THE WASHINGTON MONTHLY CO., et al.,

Defendants.

CIVIL ACTION NO. 79-1400
FILED
FEB 22 1980
JAMES F. DAVEY, CLERK

ORDER

Upon consideration of Plaintiff's Motion for Recusal, Plaintiff's Motion for a Stay, and Defendants' Motion to Compel Discovery, the oppositions thereto, and the entire record herein, it appearing to the Court that no grounds exist pursuant to 28 U.S.C. §455 supporting

Plaintiff's Motion for Recusal, it is by the Court this 22nd day of February, 1980,

ORDERED, that Plaintiff's Motion for Recusal be and is hereby DENIED; and it is

FURTHER ORDERED, that Plaintiff's Motion for a Stay be and hereby is dismissed as moot; and it is

FURTHER ORDERED, that Defendant's Motion to Compel Discovery be and is hereby GRANTED; and it is

FURTHER ORDERED, that the return date on Defendants' document production requests and interrogatories is extended until March 18, 1980, and the date for the deposition of Plaintiff shall be March 21, 1980, and shall continue from day-to-day until completed; and it is

FURTHER ORDERED, that Defendants shall file their motion to dismiss or, in the alternative, for summary judgment on or before April 21, 1980.

s/ Aubrey E. Robinson, Jr.
Aubrey E. Robinson, Jr.
United States District Judge

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

LESTER JACKSON,

Plaintiff

v.

THE WASHINGTON MONTHLY COMPANY, et al.,

Defendants.

CIVIL ACTION 79-1400

FILED
NOV 16 1979
JAMES F. DAVEY, CLERK

ORDER

It is by the Court this 16th day of November, 1979,

ORDERED, that Plaintiff shall file any motion with respect to recusal on or before November 30, 1979; and it is

FURTHER ORDERED, that Defendants shall proceed with discovery and Plaintiff shall respond to Defendants' discovery requests within the time limits set forth in the Federal Rules of Civil Procedure; and it is

FURTHER ORDERED, that Defendants shall file their motion to dismiss or for summary judgment on or before January 31, 1980.

s/ Aubrey E. Robinson, Jr.
Aubrey E. Robinson, Jr.
United States District Judge

[See critical letter material to foregoing Order : next page.]

APPENDIX 5-Nov. 11, 1979 Letter from Lester Jackson to Defense Counsel Jerry W. Markham, Copy Sent to District Judge and Resulting in Nov. 16, 1979 *sua sponte* Order.

Re: Jackson v. Washington Monthly Co., et al. Civil Action No. 79-1400

Dear Mr. Markham:

On November 6, 1979 (due no doubt to the slowness of the mail), I received your October 30, 1979 materials (copies of letter to Judge Robinson, discovery matter). Obviously, these materials crossed in the mails my letter of the same date to Judge Robinson's clerk, requesting that no new actions be taken in this case pending resolution of the recusal issue.

I write, in part, to ask whether you will agree to a stipulation, which I would draft, postponing discovery at least until after such resolution.

In any event, I must inform you that, for a whole host of reasons, I cannot possibly respond to your discovery requests by the early-December dates indicated therein. Defendants spent over two months just answering the complaint; by contrast, I am asked to undertake in half that time an inventory of files I have not looked at in years and that, to put it mildly, are in disarray (partly due to a moving job two years ago). This is a major and time-consuming task, which just cannot be completed in so short a period, especially in view of competing demands on my time. Not having the resources of a large law firm, I cannot do everything at once. So as not to mislead you, I have to consider what motions, if any, to make addressed to the discovery requests and whether to move to renew the Brooklyn appeal in light of your objection to the

Washington court's jurisdiction; and, as you know, I am appealing in the copyright case. Moreover, I must weigh whether I can appear at a deposition without a lawyer, and I will need time to try to find simultaneously competent and affordable counsel. Furthermore, it seems to me that, if I am going to be deposed, the interest of economy requires that I take defendants' depositions at the same time. I will therefore need time to prepare my own discovery requests. Finally, I have medical problems, am in the midst of seeking accurate diagnosis, and the possibility of an operation has been raised.

Under these circumstances, I do not believe I can conceivably be ready for your discovery requests for a minimum of five or six months. Accordingly, I wish to know if you are agreeable to a stipulation postponing the return dates of your discovery until either (a) May 15, 1980, or (b) at least pending determination of the recusal matter. If your response is affirmative, please be assured that I will extend similar courtesies in the future. However, if your response is negative, please reply promptly so that I can make the appropriate motion. (As to the latter point, I have written rather than telephone to honor your June 20, 1979 request that all communications be written. But I call your attention to the abysmal slowness of the mail.)

Very truly yours,
s/ Lester Jackson
Lester Jackson

cc. Judge Robinson

APPENDIX 6—Appealed District Court Opinion and Orders: Case 1

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

LESTER JACKSON,

Plaintiff

v.

THE WASHINGTON MONTHLY CO., et al.,

Defendant.

CIVIL ACTION NO. 72-749

FILED

SEP 24 1979

JAMES F. DAVEY, CLERK

MEMORANDUM OPINION AND ORDER

Before the Court are Cross-Motions for Summary Judgment in an action brought by Lester Jackson against the Washington Monthly, *et al.* Plaintiff is requesting damages arising out of an alleged infringement of his common law copyright on an unpublished manuscript entitled "The Tragedy of the Peace Movement's Lost Golden Opportunity: The Case for a Senate Fillibuster of Appropriations to End the Vietnam War, and the Case for Electoral Pressure to Bring on the Fillibuster," and the revised version entitled "How to End the War by June 30, 1971." The publication alleged to have infringed plaintiff's manuscript is an article called "Cooing Down the War: The Senate's Lame Doves," written by Defendant John Rothchild and published by Defendant Washington Monthly. This Court has jurisdiction under 28 U.S.C. §§1338, 2201 and Rule 56 of the Federal Rules of Civil Procedure.

There is no conflict as to the underlying material facts in this case. Lester Jackson wrote the aforementioned

manuscript as a thesis and sent it to the Washington Monthly for publication. The Monthly found the manuscript unsuitable for publication and recommended to Plaintiff that he send it elsewhere. Defendant did, however, keep a copy of the manuscript on file.

In his unpublished thesis, Jackson contended that the focus of the peace movement was misplaced. Instead of trying to elect a majority in both Houses of Congress, the movement should pressure Senate doves to support a fillibuster of war appropriations. The threat of defeat by ballot should be employed to force ineffective Senate doves into action, and any dove who failed to support the fillibuster should be denied reelection. He contended that the peace movement had been content with speeches and symbolic victories and that a change in the approach and demeanor of the movement would be necessary to end the Vietnam War.

Subsequent to its dealings with Plaintiff, Defendant Monthly published Rothchild's article. The article deals exclusively with the impotence of Senate doves and ponders why, if the war was desperate (as it had been characterized rhetorically by many dove Senators) anti-war Senators did not behave desperately. Plaintiff is mentioned twice in the article. He is cited as someone who tried to persuade some dovish Senators to fillibuster, and is quoted to support the notion that peace constituencies were satisfied with resolutions and symbolic victories.

Since this suit is based on an alleged common law copyright infringement, the law of the District of Columbia is controlling.[1] To recover for the infringement of his copyright, Plaintiff must show (1) ownership and copyrightability of the alleged copied material,[2] (2) access to the work by Defendant,[3] (3) substantial similarity between Plaintiff's and Defendant's work,[4] and (4) that Defendant copied Plaintiff's manuscript.[5] In the instant case, ownership of and access to the Jackson manuscript is

not disputed. It is uncontroverted that Defendants copied two sentences from Plaintiff's work; indeed, those sentences are credited to him. Defendants vigorously assert, however, that there is no substantial similarity between the works in question and that no other copying was performed.

It is evident from a perusal of the literature in question that some overlap of ideas exists. Both works deal with the behavior of Senate doves, and both criticize those doves for their inaction. An idea cannot be copyrighted, however; no copyright infringement action will lie unless the *way* those ideas are expressed is similar.[6] Furthermore, even if there is some similarity in the modes of expression, copying must be inferred from this similarity. Thus, the use of particular words or common phrases does not give rise to an action for copyright infringement; it is in the arrangement of words that a cause of action must be based.[7]

This Court finds, as a matter of law, that with the exception of the two sentences attributed to Jackson, there is no similarity between the works in question.[8] The quesiton remains, however, whether the appropriation of those two sentences renders the articles similar, and if so, whether the similarity is substantial.

It is clear that similarity is to be ascertained by a comparison of the works, taken as a whole, rather than through "hypercritical dissection of the sentences."[9] Such rigorous analysis is not needed to locate the similar portions, however. Defendant has attributed them to Plaintiff. Some similarity between works is permissible. For an infringement to have occurred, a substantial, or "material" amount of Plaintiff's work must have been appropriated. Substantiality is determined by comparing the copied material to Plaintiff's manuscript, taken as a whole.[10] If "the value of the original is sensibly diminished, or the labors of the author are substantially to an in-

jurious extent appropriated by another,"[11] a copyright infringement exists.

The thrust of Jackson's manuscript concerned persuading Senate doves to fillibuster against war appropriations. The viability of fillibustering was depicted in great detail. Senate ineffectiveness was attributed to the doves' failure to employ radical action, and electoral pressure was deemed necessary to encourage such action. Underlying this was the notion that electoral force had not been used in the past because peace constituencies had been satisfied with rhetoric. To terminate the war, Jackson asserted, the peace constituencies must be more demanding.

The appropriated sentences[12] deal solely with the satisfaction of the peace constituencies. They are merely peripheral supports for the basic thrust of Plaintiff's manuscript, and in no way reflect Plaintiff's work, taken as a whole. Their use in no way diminishes the value of the original. Defendants' use of the Jackson material could only further Plaintiff's reputation and inspire demand for publication of his manuscripts.

Jackson also contends that his labor was unfairly appropriated. This is wholly unsupported by the evidence, which reflects that Defendant Rothchild performed an extensive amount of research before writing his article.

Summary Judgment is an appropriate form of relief when it eliminates a useless trial and avoids "long and expensive litigation productive of nothing."[13] This is especially true in the instant case, where the materials on which the claim of infringement is based are before the Court, and "no amount of expert or lay testimony as to fancied similarities could change the obvious content of the exhibits."[14]

Accordingly, it is by the Court this 24th day of September, 1979,

ORDERED, that Defendants' Motion for Summary

Judgment is hereby GRANTED and Plaintiff's Motion for Summary Judgment is hereby DENIED.

s/ Aubrey E. Robinson, Jr.
Aubrey E. Robinson, Jr.
United States District Judge

FOOTNOTES

1. See Erie R. Co. v. Tompkins, 304 U.S. 64, 78 (1938).

2. 3 Nimmer on Copyright §13-03[A] p. 3-4 (1978 ed.).

3. Lapsley v. American Institute of Public Accountants, 246 F.Supp. 389 (D.D.C. 1965), at 390.

4. Id. at 390.

5. Id. at 390.

6. Id. at 391.

7. The English language is not broad enough so that similarity of phraseology and word usage will not appear in material on the same topic. . . . It would be ridiculous to consider such similarity a copyright infringement. Plaintiff has no monopoly on the words or phrases he has used. Plaintiff's right is to the arrangement of the words he has selected to express his ideas, not to the ideas or words themselves. Lapsley, supra, at 391.

8. Jackson has provided the Court with an exhibit detailing the alleged similarities in language. The following are examples from that exhibit:

Jackson: In a sense, these are the real war criminals . . . these Senators understand it [the horror] fully and vote to continue it. They are the criminals.
Rothchild: . . . in the context of the Senate's required assent to Vietnam, the doves become partners in crime.
Jackson: The idea that speaking out constitutes "courageous leadership" is indicative of the whole sorry mess we are in. If speeches could end the war, we would have been out of Vietnam long ago. . . .
Rothchild: Until recently, dove Senators have been committed only to a war of rhetoric, which they won long ago.

There was a time when even words were courageous, but the war has won a victory over the words by seducing them, so that it is not distinctive to talk against the war, even while you are escalating it.

9. Lapsley, supra, at 391: Costello v. Lowe's Inc., 159 F.Supp. 782 (D.D.C. 1958), at 788.

10. Nimmer, supra at 13-29.

11. Id. at 13-31.

12. "Anything done by congressional peace advocates has been gratefully accepted and applauded [sic]," writes Lester Jackson. "Dove constituents have been impressed with debates and hearings, with resolutions and with resolutions repealing resolutions, with moral victories and symbolic events."

13. Washington Post Co. v. Keogh, 365 F.2d 965 (D.C. Cir. 1966) at 968, *cert. den.*, 385 U.S. 1011.

14. Costello v. Loew's Inc., *supra*, at 789; Gethers v. Blatty, 283 F.Supp. 303 (D.C. Cal. 1968).

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

LESTER JACKSON,

Plaintiff

v.

THE WASHINGTON MONTHLY CO., et al.,

Defendants.

CIVIL ACTION NO. 749-72

FILED
OCT 2 1979
JAMES E. DAVEY, CLERK

ORDER

Upon consideration of Plaintiff's Motion to Amend the Complaint, the Court having carefully reviewed the record and all applicable Rules, notes that (1) granting the motion would induce delay and serve to prejudice Defendants, and (2) the unfair competition claim is pre-empted by the copyright claim asserted in the original complaint.

Accordingly, it is by the Court this 2nd day of October, 1979,

ORDERED, that Plaintiff's Motion to Amend the Complaint is DENIED, *nunc pro tunc* February 15, 1979.

s/ Aubrey E. Robinson, Jr.
Aubrey E. Robinson, Jr.
United States District Judge

APPENDIX 7—PLAGIARISM EXAMPLE *NOT* CITED BY JUDGE, *SUPRA* 33*n8, WHICH APPEARED BETWEEN THE ONLY TWO HE DID CITE IN SUPPORT OF FINDING "THERE IS NO SIMILARITY BETWEEN THE WORKS," *SUPRA* 31a.

2. *Rothchild,* Ex. L, p. 14b, 1st full par.:

(a) . . . Nixon had stolen away about $100 million in foreign assistance money for use in Cambodia during 1970-money that Congress, in its relative wisdom, had specifically given to Taiwan, Greece, and Turkey. . . .

(b) . . . now Nixon was returning to ask them [Congress] to approve his move by replacing the transferred funds and also to appropriate money for Cambodian military and economic assistance.

Jackson, Ex. I, p. 9, 1st par. and p. iv, fn. 26:

(a) The President might be able to divert 100 *m*illion dollars of foreign aid money to a country not provided for by Congress (e.g., Cambodia, 1970).

(b) In 1970 . . . Nixon diverted 100 million dollars appropriated for aid to Taiwan, Greece and Turkey to Cambodia, for which no provision had been made. Eventually, he came to Congress to ask for restoration of the original funds, as well as additional money. *The New York Times,* December 13, 1970, p. 2E

[Cf. A285-318]

APPENDIX 8—Court of Appeals Opinion in Prior Case 1 Appeal

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 76-1782

LESTER JACKSON, APPELLANT

v.

THE WASHINGTON MONTHLY CO., ET AL.

Appeal from the United States District Court
for the District of Columbia
(D.C. Civil 749-72)

Argued October 25, 1977

Decided December 13, 1977

Judgment entered this date

Lester Jackson, pro se, for appellant.

John H. C. Barron, Jr., for appellee.

Before McGOWAN, TAMM and ROBINSON, *Circuit Judges*.

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

Opinion for the Court filed by *Circuit Judge* ROBINSON.

ROBINSON, *Circuit Judge*: In the District Court in 1972, appellant instituted this litigation charging appellees with wrongful appropriation and publication of portions of an article he had submitted to them in 1970. Settlement negotiations commenced, and although some understandings were achieved, the parties dispute whether they ascended to the level of any sort of enforceable agreement.[1] On January 23, 1975, while efforts in that direction still continued, the court convened a status call and during the course thereof directed appellant's counsel to report within 30 days on progress toward full settlement.[2] No such report was made, and on March 14 counsel for appellees wrote to alert the court to the omission.

Almost three months came and went before the District Court, on June 5, *sua sponte* ordered the action dismissed with prejudice, effective June 25.[3] The order recited that "[appellant] was instructed through his attorney to advise the Court within thirty (30) days concerning the effectuating of settlement agreement reached

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[1] Had the parties reached a binding settlement contract, appellant would have acquired the right to specific enforcement or damages for its breach, regardless of subsequent dismissal of the underlying litigation. Cf. *Autera* v. *Robinson*, 136 U.S.App.D.C. 216, 220 n.17, 419 F.2d 1197, 1201 n.17 (1969).

[2] Appellees state that during the session the court criticized appellant's counsel for earlier procrastinations and failures to obey instructions. We put this observation to one side. *Hassenflu* v. *Pyke*, 491 F.2d 1094, 1095 (5th Cir. 1974) (per curiam). No transcript of the status-call conference appears in the record on appeal, and the order dismissing appellant's action referred to but a single dereliction—noncompliance with the reporting requirement on settlement progress.

[3] *Jackson* v. *Washington Monthly Co.*, Civ. No. 749-72 (D.D.C.) (order of June 5, 1975), Appendix for Appellant (App.) 18; see Fed.R.Civ.P. 41(b).

between the parties," and that "[appellant's] counsel has failed to obey the instructions of this Court."[4] Nearly a year later, on June 1, 1976, appellant's counsel, claiming inadvertance, moved for reinstatement of the suit pursuant to Federal Civil Rule 60(b).[5] The court denied the motion in the view that "such relief is not warranted

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[4] *Id.*

[5] Fed.R.Civ.P. 60(b), providing:

> On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U.S.C., § 1655, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

by the record *currently before the Court* . . . ,"[6] and this appeal was initiated.

At first blush, the question before us might seem to be whether the District Court had authority to impose a dismissal with prejudice,[7] predicated as it was upon but a single violation by counsel of a pretrial directive. Were that truly the pertinent inquiry, we would be confronted at the outset by the Supreme Court's decision in *Link* v. *Wabash Railroad Company*.[8] To be sure, the Court there held that in the exercise of a sound discretion a federal judge contemplating dismissal may visit the sins of the lawyer upon the client who has freely selected him.[9] But *Link*[10] and the cases interpreting it[11]

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[6] *Jackson* v. *Washington Monthly Co.*, *supra* note 3 (order of June 26, 1976), App. 25 (emphasis supplied).

[7] The keynote of our review is the proposition that dismissal is a matter left to the sound discretion of the District Court. *E.g.*, *Slavitt* v. *Meader*, 107 U.S.App.D.C. 396, 397, 278 F.2d 276, 277 (per curiam), *cert. denied*, 364 U.S. 831, 81 S.Ct. 70, 5 L.Ed.2d 57 (1960); *Ali* v. *A & G Co.*, 542 F.2d 595, 596 (2d Cir. 1976); *Marshall* v. *Sielaff*, 492 F.2d 917, 918 (3d Cir. 1974); *Connolly* v. *Papachristid Shipping, Ltd.*, 504 F.2d 917, 920 (5th Cir. 1974); *Beshear* v. *Weinzapfel*, 474 F.2d 127, 130 (7th Cir. 1973); *Moore* v. *St. Louis Music Supply Co.*, 539 F.2d 1191, 1193 (8th Cir. 1976); *Van Bronkhorst* v. *Safeco Corp.*, 529 F.2d 943, 947-948 (9th Cir. 1976); *Stanley* v. *Continental Oil Co.*, 536 F.2d 914, 917 (10th Cir. 1976).

[8] 370 U.S. 626, 82 S.Ct. 1386, 8 L.Ed.2d 734 (1962).

[9] *Id.* at 633-634, 82 S.Ct. at 1390, 8 L.Ed.2d at 739-740.

[10] *Id.* at 633-634 & n.11, 82 S.Ct. at 1390-1391 & n.11, 8 L.Ed.2d at 740 & n.11. The *Link* Court expressly reserved decision on the question whether dismissal is justified solely on the basis of one "unexplained absence from a pretrial conference." *Id.* at 634, 82 S.Ct. at 1391, 8 L.Ed.2d at 740.

[11] *E.g.*, *Cherry* v. *Brown-Frazier-Whitney*, —— U.S.App. D.C. ——, ——, 548 F.2d 965, 969 (1976); *Slavitt* v. *Meader*, *supra* note 7, 107 U.S.App.D.C. at 398, 278 F.2d at 273; *Rich-*

have thus far generally approved dismissal of the client's action due to counsel's conduct only when the attorney has taken a course of protracted neglect. Here the District Court did not explicitly rely upon or even advert to such a history in either of its two orders.[13]

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mond v. *General Motors Corp.*, 427 F.2d 196, 199 (1st Cir. 1971); *Ali* v. *A & G Co.*, *supra* note 7, 542 F.2d at 596-597; *Fischer* v. *Buehl*, 450 F.2d 950, 951 (3d Cir. 1971) (per curiam); *Bush* v. *United States Postal Serv.*, 496 F.2d 42, 44 (4th Cir. 1974); *Reizakis* v. *Loy*, 490 F.2d 1132, 1135 (4th Cir. 1974); *Boazman* v. *Economics Lab., Inc.*, 537 F.2d 210, 212 (5th Cir. 1976); *Hyler* v. *Reynolds Metal Co.*, 434 F.2d 1064, 1065 (5th Cir. 1970) (per curiam), *cert. denied*, 403 U.S. 912, 91 S.Ct. 2219, 29 L.Ed.2d 689 (1971); *Beshear* v. *Weinzapfel*, *supra* note 7, 474 F.2d at 131-132; *Navarro* v. *Chief of Police*, 523 F.2d 214, 217 (8th Cir. 1975) (per curiam); *Stanley* v. *Continental Oil Co.*, *supra* note 7, 536 F.2d at 917; *Meeker* v. *Rizley*, 324 F.2d 269, 271 (10th Cir. 1963); see *Pulliam* v. *Pulliam*, 156 U.S.App.D.C. 25, 26, 478 F.2d 935, 936 (1973) (Rule 60(b) relief should be liberally allowed to mitigate the impact of counsel's neglect). See generally Note, *Federal Pre-Trial Practice: Study of Modification and Sanctions*, 51 Geo. L.J. 309, 340 (1963); *Annot.*, 20 A.L.R.Fed. 488 (1974). The result we reach here eliminates the need to determine whether a dismissal prompted by an isolated episode of neglect is so contrary to what the vast majority of courts expectably would do in such instances that, to avoid problems of fairness—and perhaps of due process—it should be excised from the area traditionally left to trial-court discretion. See *Noonan* v. *Cunard S.S. Co.*, 375 F.2d 69, 71 (2d Cir. 1967), quoting B. Cardozo, The Nature of the Judicial Process 33 (1921) ("[i]t will not do to decide the same question one way between one set of litigants and the opposite way between another").

[13] See text *supra* at notes 4-6. The District Court did postpone the effective date of its dismissal order for 20 days, presumably to give appellant's counsel an opportunity to avoid dismissal by timely coming forward with an explanation for his disobedience of the direction to report. We need not decide whether the failure to accept this invitation supplies any additional history of dilatoriness prerequisite to dismissal. Appellant's counsel did send to the court a letter requesting

We need not, however, consider whether the court exceeded the bounds of legitimate discretion in treating the situation as one appropriate for dismissal, for it has become clear that the court did not have before it two items of highly relevant information.[13] From the showing now made by appellant,[14] it appears that his lawyer might not only have been grossly rather than just mildly negligent toward his client,[15] but that he might also have misled the client by reassuring him that the litigation was continuing smoothly when in fact it was suffering severely from lack of attention. These reassurances may even have continued long after the litigation, to the lawyer's knowledge, had already been aborted.[16] And it seems that appellant may not have known the extent of

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that the dismissal be vacated, but, when told that the proper procedure was a motion to vacate, he failed to file the necessary papers. Only much later, when confronted by his perplexed client, did the attorney finally, and with less than complete candor, seek reinstatement. See note 16 *infra*.

[13] We recall that the District Court denied Rule 60(b) relief as unwarranted "by the record currently before" it. See text *supra* at note 6.

[14] Appellant appears *pro se* on this appeal.

[15] See note 11 *supra*.

[16] Appellant alleges that he repeatedly asked his attorney whether the case was in good order and invariably was told that it was. He also asserts that, although the case was dismissed in June, 1975, he did not learn about it until told by appellees in May, 1976. He says that the lawyer, when told of this, registered surprise and stated that he would file a motion to vacate, which he did. See text *supra* at note 5. The motion was accompanied by the latter's affidavit averring that "[s]ince it appeared obvious that the parties were conducting themselves in order to carry out the settlement involved, there appeared to be no need to burden the Court with a Rule 60(b) application to vacate the Order involved." App. 22.

such dilatory and deceptive conduct until after the case arrived in this court.

We in this circuit have held that so serious a dereliction by an attorney, when unaccompanied by a similar default by the client,[17] may furnish a basis for relief under Rule 60(b)(6).[18] That is the more so where, as apparently here, little if any prejudice has befallen the other party to the litigation.[19] Because the District Court

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[17] Appellees argue that appellant was dilatory in not submitting for 17 months a draft of an article which as part of the alleged settlement they had agreed to publish if it was of high quality. Appellant counters, with apparent support in the parties' correspondence, that appellees knew the reason for the holdup and approved of it, and that they contributed to the slowdown by failing to review the article expeditiously and to inform appellant specifically of editorial changes to be made. The District Court will be free to delve into this on the remand that we will order, but nothing we now know indicates that appellant was less than diligent in honoring agreed aspects of the settlement. Compare *Cherry* v. *Brown-Frazier-Whitney*, *supra* note 11, —— U.S.App.D.C. at ——, 548 F.2d at 969.

[18] *L.P. Stewart, Inc.* v. *Matthews*, 117 U.S.App.D.C. 279, 280-281, 329 F.2d 234, 235-236, *cert. denied*, 379 U.S. 824, 85 S.Ct. 50, 13 L.Ed.2d 35 (1964) (reinstatement after two years). The gross-neglect rule of *L.P. Stewart* has been criticized as discordant with *Link*. 7 J. Moore, Federal Practice ¶ 60.27[2], at 369-370 n.47 (2d ed. 1975); see *United States* v. *Cirami*, 535 F.2d 736, 740-741 (2d Cir. 1976). But even if that were so, an attorney's deception of a blameless client would survive as a basis for relief under Rule 60(b)(6). See 7 J. Moore, *supra* ¶ 60.27[2], at 368 n.44. When a client does not knowingly and freely acquiesce in his attorney's neglectful conduct, but instead is mislead into believing that the attorney is industrious, dismissal is not only a harsh step but one for which the circumstances provide little support for an agency theory as a rationale. *Cf. Thane Lumber Co.* v. *J.L. Metz Furniture Co.*, 12 F.2d 701, 703 (8th Cir. 1926); *Chamberlain* v. *Amalgamated Sugar Co.*, 42 Idaho 604, 247 P. 12, 14 (1926).

[19] Appellees state that they were prejudiced, but their contention in this connection must first be investigated in the

could not have been aware of these all-important circumstances when it acted, we think it proper to vacate the dismissal order and remand the case to afford appellant an opportunity to make his presentation for relief under Rule 60(b)(6).[20]

We are constrained to conclude this appeal on a note of caution. Trial-court dismissal of a lawsuit never heard on its merits is a drastic step, normally to be taken only after unfruitful resort to lesser sanctions.[21] And while

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District Court, which did not enter into that area when it ordered dismissal. And if appellant is correct in his claims that appellees contributed to the delay in effectuating the purported settlement, and that for almost a year they allowed him to believe that his suit was in good standing although they knew that it was not, he could not fairly be charged with any prejudice that appellees might have suffered. *Cf. Finley* v. *Parvin/Dohrmann Co.*, 520 F.2d 386, 392 (3d Cir. 1975).

[20] See 28 U.S.C. § 2106 (1970). Compare *Klapprott* v. *United States*, 335 U.S. 601, 614-615, 69 S.Ct. 384, 390-391, 93 L.Ed. 266, 277-278 (1949); *Erick Rios Bridoux* v. *Eastern Air Lines, Inc.*, 93 U.S.App.D.C. 369, 372, 214 F.2d 207, 210 (1954).

[21] *Asociation de Empleados del Instituto de Cultura Puertorriquena* v. *Rodriguez Morales*, 538 F.2d 915, 917 (1st Cir. 1976); *Bush* v. *United States Postal Serv.*, *supra* note 11, 496 F.2d at 45; *Industrial Bldg. Materials, Inc.* v. *Interchemical Corp.*, 437 F.2d 1336, 1339 (9th Cir. 1970); *Himalayan Ind.* v. *Gibson Mfg. Co.*, 434 F.2d 403, 405 (9th Cir. 1970); *Garces* v. *Bradley*, 299 A.2d 142, 144 (D.C. App. 1972); see Comment, *Involuntary Dismissal for Disobedience or Delay: The Plaintiff's Plight*, 34 U. Chi. L. Rev. 922, 929 (1967); Comment, *Dismissal for Failure to Attend a Pretrial Conference and the Use of Sanctions at Preparatory Stages of Litigation*, 72 Yale L.J. 819, 823-824 (1963). The Fifth Circuit's sensible rule is that dismissal is proper only where there is a clear record of delay and lesser sanctions are insufficient. *Boazman* v. *Economics Lab., Inc.*, *supra* note 11, 537 F.2d at 212 (lesser sanctions adequate in "all but the most flagrant circumstances"); *Coon* v. *Charles W. Bliven & Co.*, 534 F.2d 44, 49 (5th Cir.), *cert. denied*, 429 U.S. 980, 97 S.Ct. 491, 50 L.Ed.2d

appellate review is limited by the binding authority of *Link* to whether judicial discretion has been abused," a sound discretion hardly comprehends a pointless exaction of retribution. Dismissals for misconduct attributable to lawyers and in no wise to their clients invariably penalize the innocent and may let the guilty off scot-free. That curious treatment strikes us as both anomalous and self-defeating.[23] When the client has not personally misbehaved and his opponent in the litigation has not been harmed, the interests of justice are better served by an exercise of discretion in favor of appropriate action against the lawyer as the medium for vindication of the judicial process and protection of the citizenry from future imposition.[24] Public confidence in the legal system

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588 (1976); *Mann* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 488 F.2d 75, 76 (5th Cir. 1973) (per curiam); *Flakes* v. *Little River Marine Constr. Co.*, 389 F.2d 885, 887-889 (5th Cir.) *cert. denied*, 392 U.S. 928, 88 S.Ct. 2287, 20 L.Ed.2d 1387 (1968).

[23] See notes 7 & 9 *supra*.

[24] *Hassenflu* v. *Pyke*, *supra* note 2, 491 F.2d at 1095 (dismissal is too severe where no indication client knew of or participated in counsel's dereliction); *Edsall* v. *Penn Central Transp. Co.*, 479 F.2d 33, 35 (6th Cir.) (per curiam), *cert. denied*, 414 U.S. 1040, 94 S.Ct. 541, 38 L.Ed.2d 331 (1973) (same); *Moore* v. *St. Louis Music Supply Co.*, *supra* note 7, 539 F.2d at 1194 (same); see *Cherry* v. *Brown-Frazier-Whitney*, *supra* note 11, —— U.S.App.D.C. at ——, 548 F.2d at 965-966 (dismissal with prejudice is "a drastic sanction" warranting "meticulous" review on appeal; *Richmond* v. *General Motors Corp.*, *supra* note 11, 437 F.2d at 199 & n.4 (less severe sanctions preferred).

[25] See our discussion in *Bibeau* v. *Northeast Airlines, Inc.*, 139 U.S.App.D.C. 28, 29 & n.4, 429 F.2d 212, 213 & n.4 (per curiam 1970) (reversing refusal to reinstate as abuse of discretion). See also *Moore* v. *St. Louis Music Supply Co.*, *supra* note 7, 539 F.2d at 1193 (other available sanctions "do not impact so decisively upon the innocent litigant"); 7 J. Moore,

is not enhanced when one component punishes blameless litigants for the misdoings of another component of the system; to laymen unfamiliar with the fundamentals of agency law, that can only convey the erroneous impression that lawyers protect other lawyers at the expense of everyone else.

Vacated and remanded.

Federal Practice ¶ 60.27[2], at 366 & n.37, 369 (2d ed. 1975) (punishing attorney instead of innocent client is more consistent with spirit of the Federal Rules).

The alternatives include an assessment to the delinquent lawyer of costs and counsel fees generated by the delinquency. *Bardin* v. *Mondon*, 298 F.2d 235, 238 (2d Cir. 1961) (dismissal conditioned on counsel paying opponent's costs and fees is proper where client not responsible; unconditional dismissal vacated); *Fischer* v. *Buehl*, *supra* note 11, 450 F.2d at 951 (counsel should bear costs of aborted pretrial conference and of appeal of dismissal order); see 28 U.S.C. § 1927 (1970). The court's disciplinary authority is available, and its contempt powers may also be. *Dyotherm Corp.* v. *Turbo Machine Co.*, 392 F.2d 146, 149 (3d Cir. 1968); Comment, *supra* note 21, 72 Yale L.J. at 830 (court may reprimand lawyer, hold in contempt, or prohibit from practicing before the court for a limited time). Communication of the lawyer's action to the client or the bar association is another alternative. See *King* v. *Mordowanec*, 46 F.R.D. 474, 478 n.5 (D.R.I. 1969). See generally Note, *supra* note 11, 51 Geo. L.J. at 332 & n.94 (discussing various sanctions less rugged than dismissal and aimed directly at party responsible for inconvenience).

APPENDIX 9—MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR SUMMARY REVERSAL, pp. 4-15; Dated Dec. 21, 1979; Filed in Case 1 Appeal (No. 79-2264); Also filed as Exhibit A to Recusal Motion, Dated Jan. 7, 1980, in District Court in Case 2 (Civil Action 79-1400); Also appears in Court of Apepals Appendix at A546-558, with remainder at A751-771

FACTS [4]

This is a three part history: the April 12, 1978 Rule 60(b) hearing, and the periods prior and subsequent thereto.

1. *LACK OF FAIRNESS IN THE FIRST DISMISSAL.* At a pretrial conference in 1973, a settlement in principle was reached, followed by an extensive correspondence working out the details.

In the midst of these negotiations, the Judge intervened *sua sponte.* He convened a status call in January 1975, and formally directed plaintiff's counsel to provide settlement information. Counsel did not comply. Later, in April or May, the Judge's law clerk, by telephone, informally sought the same information from defense counsel, who "informed the clerk . . . we had heard nothing further from the plaintiff" (Tr. 154:21-24). In fact, plaintiff and defendants were actively corresponding, and defendants had heard regularly from plaintiff. (Pl. Ex. 2, 60(b) hearing.)

WHEREUPON, without warning or use of lesser sanctions to obtain compliance with his status call directive, the Judge, on June 5, 1975, *sua sponte* ordered the case dismissed with prejudice effective June 25. The 20-day delay ostensibly "was provided to permit Plaintiff's counsel another opportunity to advise the Court of the status of the case. . . ." (Memorandum and Order, April 14, 1978, p. 2; Tr. 87:15-17.) Promptly, on June 11, 1975, plaintiff's counsel did so advise the Court and requested

that the order be set aside. The Judge's clerk replied on June 13 that, to vacate the order, a motion was required. No motion was made. Therefore, it is now clear, the [5] dismissal became effective, not because of failure to advise the court of the case's status, but due to use of the wrong *form:* a letter instead of a motion containing identical information and request to vacate.

Pertinent here is this. The Judge required no motion to exercise his inherent power to enter an order punishing plaintiff. But he spurned a plea to use his equally inherent power to enter another order without motion, for plaintiff, vacating the first order *before* it became effective. Cf. Tr. 91:15-17; *infra* 25n.

In June 1976, a Rule 60(b) motion was made; the Judge summarily denied it without the hearing requested (Order June 22).

Counsel appealed to this Court (No. 76-1782), and plaintiff took over (motion, January 20, 1977). In *Jackson v. Washington Monthly Co.*, 186 U.S.App.D.C. 288, 569 F.2d 119 (1977), this Court suggested, *inter alia,* that the District Judge had (1) acted "contrary to what the vast majority of courts expectably would do," (2) raised "problems of fairness—and perhaps of due process," (3) been too drastic in not first resorting to lesser sanctions, and (4) abused discretion with "a pointless exaction of retribution." *Ibid.*, at 290n.11, 292, 569 F.2d at 121n.,123.

The case was remanded to the same Judge.

2. *HOW THE JUDGE GRUDGINGLY RESTORED THE CASE.* On April 12, 1978, pursuant to this Court's mandate, the Judge held a hearing on plaintiff's 60(b) motion. During the hearing, numerous remarks by the Judge made clear that, at a minimum, "his impartiality might reasonably be questioned" and also strongly suggested that he had "a personal bias or prejudice concerning a party," the plaintiff-appellant. This may be divided into

four categories: pre-judgment of the case, hostility to the plaintiff and to his case, and favored treatment of the defendants.

A. *Prejudication on the Merits Before Submission of Any Evidence.* By the Judge's own account, the hearing had nothing to do with the merits of the case (Tr. 187:21-22; 188:6-8). Also, *not a shred of evidence* addressed to the merits had ever been submitted to him. Nevertheless, the Judge made plain that he already had firmly made up his mind on the merits of the claim. [6]

(1) He told plaintiff: "the reason they [lawyers] wanted all that money was to discourage you. And that's one way lawyers have of discouraging *litigation* that they think *should not be brought*. . . . [Your] lawyer got himself *suckered* in." (Tr. 192:17-22; emphasis added.)

(2) Plaintiff objected, "the lawyers I went to simply told me these fees without even listening to the case"; but the Judge insisted: "Oh, yes, they listened"* (Tr. 192:25-193:2).

(3) When defense counsel said he would "file a mo-

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*In fact, the Judge had no personal knowledge of plaintiff's attempts to find counsel, and had only plaintiff's uncontradicted and unimpeached testimony that the lawyers he consulted simply wanted to be paid high fees, for which they would gladly have represented him; and that they did not pass judgment on the merits of his claim (Tr. 103:16-25). The Judge's rejection of the view that many lawyers just want large fees, period—even in meritorious cases—occurred, ironically, minutes after defense testimony to a $10,000 legal fee up to that point (Tr. 175:16) and his own prediction of even greater costs (Tr. 183:11).

Evidently, the Judge did not reflect on why defendants spent so much money on a claim that "should not be brought." Obviously, *they* thought otherwise, and that plaintiff could win a far larger sum. Also, as both the Judge and defense noted, most of that $10,000 was spent trying to avoid a trial on the merits (Tr. 183:13-17, 175:16-19); surely such expenditure would not have been incurred if defendants had no fear of the outcome of such trial.

tion for summary judgment," the Judge said: "I think you are in a position to do that" (Tr. 185:23-25). On what evidence?!

(4) Prior to the summary judgment motions, the Judge concluded: "There aren't that many legal issues in this case. And the basic facts are not that much in dispute.
[7] They really aren't. There is a whole lot of peripheral stuff" (Tr. 191:2-5).*

(5) Accordingly, in response to a request by no one, the Judge warned: "I will not waive the . . . rule. What you can't tell me in 35 pages . . . won't be worth saying about this case" (Tr. 190:5-7).** This phraseology strongly suggests:

B. *Hostility to the Case.* Because he predetermined that this litigation should not have been brought and there was not much to it, the Judge resented the case as unworthy of his attention. He reopened it only with great reluctance, pursuant to a Court of Appeals mandate he also resented.

(1) "And there is no way that I can keep [plaintiff] from having a 60(b) motion granted, no way" (Tr. 183:22-23). The Judge did not say the evidence warranted reopening the case; he granted the motion negatively, implying he was sorry he couldn't find a way to deny it. Hence he was anxious for a summary judgment motion so that he could dismiss the case again. *Supra*, p. 6, item (3); *infra* 15.

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*Plaintiff's position is that the basic facts are keenly in dispute on defendants' theory of law; and whether plaintiff's or defendants' theory should be accepted presents "many legal issues" indeed. See, e.g., Plaintiff's first Summary Judgment Points and Authorities, *passim*, esp. Points I, X-XII.

**On the Judge's further attempts to minimize this case, see also Tr. 191:6-192:10.

(2) As intimated by foregoing item (5), the Judge was greatly concerned lest this case "waste my time."*

(3) This time preoccupation was rooted in a pre- [8]
judication of the hearing as well as the merits of the case. The Judge saw the hearing as a mere pro forma exercise, to comply with this Court's mandate. Thus he said, early on,

> I know what the Court of Appeals said and I know what I am going to do, what I *have* to do by way of taking evidence . . . and what the considerations are. [Tr. 37:1-3; emphasis added.]

Later: "*I know exactly what happened.* . . . But I am letting you make your record." (Tr. 110:25-111:1; emphasis added.) Finally, when plaintiff cited this Court's mandate, the Judge exclaimed:

> Oh, you keep reading to me about the Court of Appeals. . . . *The Court of Appeals doesn't know as much as I know about this case.*
>
> [Tr. 178:24-179:3; emphasis added.]**

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*Repeated examples include: (a) "Oh, don't waste my time. Tr. 61:12. (b) "You're not a lawyer so I can't even take the time to explain that to you. That's what has taken so long." Tr. 102:1-2. (c) "[Y]ou surely don't know how to interpret 'consideration,' . . . . The only reason we're here, taking up all this time." Tr. 73:9-11. (d) "You're wasting a lot of time. . . ." Tr. 141:11. (e) "It really is. It's a complete waste of time." Tr. 164:9-10. (f) "You are wasting my time. . . ." Tr. 166:5. (g) On plaintiff's request to make an opening statement: "Do you have to? Opening about what?" Tr. 14:5-6. (h) "I don't see why you waste time. . . ." Tr. 177:18.

**Other examples of hearing prejudgment are: (a) "It's a cut and dry proposition." Tr. 102:6. (b) "You know what the issues are here. It's very clear. Make a record of what went on. . . ." Tr. 61:14-15. (c) "I know what you have to say. There's not a whole lot you have to contradict about his—" Tr. 101:20-21.

C. *Hostility to Plaintiff.* The latter statement is a reasonable basis to infer that, in addition to distaste for the case, the Judge bridled at this Court's mandate (cf. *supra* 5) and at plaintiff for having exercised his right to appeal.

(1) When plaintiff wanted to cross-examine a defendant, the Judge bitterly declared: *"Well, you know what's going to happen* if I don't let him do it. *He will go right back up to the Court of Appeals and say I arbitrarily cut it off."* (Tr. 182:4-6; emphasis added.) Thus sensitive about
[9] this Court's criticism of his possible unfairness (*supra* 5), the Judge sought to justify the dismissal: "if I had known, you wouldn't have had to go to the Court of Appeals. Don't you understand that?" (Tr. 179:25-180:2). Also, "the reason I had dismissed the case is that I had bent over backwards to try to get the lawyers to tell me what was going on. . . ."* (Tr. 99:1-3).

Besides resenting the appeal, the Judge left no doubt about his bias against plaintiff for not being a lawyer.

(2) "I know you want to say. . . . But much of what you want to say is not relevant. . . . *You're not a lawyer* so I can't even take the time to explain that to you. That's what has taken so long." (Tr. 101:23-102:2; emphasis added.)

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*Actually, plaintiff's lawyer did tell the Judge what was going on before the dismissal, which became effective because counsel applied by letter rather than motion to vacate the order. The Judge would not enter a *sua sponte* order to vacate a *sua sponte* order before the latter went into effect. Also, lesser sanctions were not tried, according to this Court. *Supra* 5; *infra* 25n.

The Judge became quite sensitive: "do you think I don't understand . . . ?" and "Are you assuming I am ignorant and do not understand what the testimony is?" (Tr. 172:5; 177:20-21.) Also, "It's given the Court of Appeals trouble and it gives this Court trouble. Tr. 100:11-12.

(3) "And don't 'okay' me. . . . *Stand up if you want to act like a lawyer,* your own lawyer or anybody else's lawyer" (Tr. 79:6-9; emphasis added).*

(4) *"There is nothing on God's earth worse than a pro se litigant* unless he's completely ignorant, and the other one is one who thinks he knows everything" (Tr. 182:7-9; emphasis added). Meaning of course that there is nothing worse on God's earth than the plaintiff, according to the Judge.

(5) Even when critical of defense counsel, the Judge used plaintiff as a model of what he disliked: "You're *supposed to be a lawyer* now, Mr. Barron. *He's pro se; not you.*" (Tr. 126:25-127:1; emphasis added.) [10]

(6) In contrast to his attitude toward the *pro se* plaintiff, the Judge sympathized with plaintiff's former counsel, depicted as a hapless "sucker [who] worked for nothing and now stands to find himself disciplined.'" (Tr. 192:21-23.)**

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*Plaintiff already was standing, but not straight enough for the Judge. Tr. 79:3-4; Jackson Affidavit in support of this motion, ¶7.

**Appellant is unaware that counsel ever was actually disciplined (Jackson Aff. ¶6). If discipline was in order, it was not for taking the case but for neglecting it. The Judge's comment was minutes after he referred to counsel's failure to do "what he was supposed to do ethically or legally or logically" and to "discharge his responsibilities either to this Court or to this plaintiff." (Tr. 183:4-6, 20-21.) The Judge also noted "a history of neglectful behavior." (Memorandum and Order, April 14, 1978, p. 1.) And this Court described counsel as "grossly negligent," "dilatory and deceptive." *Jackson v. Washington Monthly, supra* 5, 186 U.S.App.D.C. at 291, 569 F.2d at 122.

Contrary to the Judge's sympathy, this Court cautioned lest laymen believe "that lawyers protect other lawyers at the expense of everyone else." *Ibid.*, 186 U.S.App.D.C. at 293, 569 F.2d at 124. On the other hand, the Judge's sympathy implies condonation of such behavior in a lawyer retained on a contingency fee basis.

From general aversion to non-lawyers, it was a short step to denigration of plaintiff for specific errors.

(7) "Now you're arguing . . . don't pull any theatrics here. This is not a television studio" (Tr. 68:21-25). This was after plaintiff said: "Now, certainly it's not an adequate reply in terms of what you testified regarding the terms—" (Tr. 68:19-20). See also Jackson Aff. ¶5.

(8) In response to plaintiff's agreement three times to produce a document (Tr. 186:9, 12, 14): "Don't play games with me. . . . I didn't start yesterday. . . . Yes, you have got it . . . in your briefcase because you were
[11] prepared to get that in here someway in some form or fashion if I had let you."* (Tr. 186:15-18).

In light of the foregoing, there can be no surprise at the Judge's very low opinion of plaintiff's abilities.

(9) "We could spend the rest of the day, Mr. Barron [defense counsel], trying to have Mr. Jackson understand, and there's no point. . . He would not understand" (Tr. 36:20-24). Also: "You don't understand that it was not [relevant]—you just don't understand, and I can't make you."** (Tr. 159:16-17.)

(10) "I am not here to argue with you. See, that's your problem. Nobody can tell you anything. Your lawyer couldn't. . . . The five lawyers that you went to that

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*The only reason the plaintiff had with him the document and a large briefcase is that the Judge himself had ordered the parties to bring their files to the hearing. Tr. 4:18-20; Jackson Aff. ¶8.

**Plaintiff contended it was highly relevant that, in response to a request by the Judge's law clerk for information on the status of the settlement prior to the dismissal, defense counsel did not tell the clerk (and the Judge) that an active correspondence was in progress. *Supra* 4. Ironically, later, the Judge said that, if he had known what was really going on, no appeal would have been necessary. *Supra* 9.

wouldn't take your case couldn't tell you anything."* (Tr. 192:12-16).

(11) "Well, we will make up the order because *you wouldn't even know* how to draft an order." (Tr. 193:11-12; emphasis added.) Six days earlier, on April 6, 1978, the Judge had signed an order drafted by plaintiff! It is in the record.

If the *pro se* plaintiff was so inept, it followed that what he had to say was unworthy of more attention than absolutely required by this Court's mandate, *supra* 8. This prejudice produced respectful consideration of defense counsel, and [12]

D. *Favored Treatment of Defendants.* Consider:

(1) At the outset, plaintiff asked: "May I make an opening statement first?" The Judge's impatient retort was: "Do you have to? . . . You have talked . . . three times about what you intend to show" (Tr. 14:5-10). IN FACT, prior to this request, defense counsel spoke 1014 (45.11%) of 2248 words, the Judge 964 (42.88%)—and the plaintiff 270 (12.01%), or 26.63% of defense counsel, who spoke nearly four times as much as plaintiff was permitted. (See also, Jackson Aff. ¶9).

(2) At the end, plaintiff was barred from cross-examining a defendant: "No, we are going to finish this tonight. I have other things set for tomorrow. And I don't

*In fact, the problem was not that plaintiff's lawyer *could* not tell him anything; the lawyer *did* not. Minutes earlier, the Judge said: "Your lawyer knew it and never told you, never told you." Tr. 179:21-22. Also, it was uncontradicted that it was the lawyer who did not listen to plaintiff's request that the entire settlement correspondence be placed before the Judge when the 60(b) motion was made. Tr. 114:16-25; 34:17-35:2.

Finally, plaintiff never said five lawyers wouldn't take his case: he said they wanted high fees to do so. *Supra* 6n.

think . . . anything . . . relevant . . . is going to take very long." (Tr. 181:12-14.) Shortly before, on direct examination of the same witness, defense counsel said "[w]e're almost finished"; the Judge replied reassuringly: "Don't hurry at all because we can come back tomorrow if we don't get finished tonight." (Tr. 173:9-11.)

(3) In the middle, too, plaintiff was sharply cut off: "I didn't ask anything from you."* (Tr. 139:8.)

[13] (4) Whereas plaintiff could not question one witness at all, when defense counsel was concluding with "No further—" he was encouraged to ask more questions: "You can lead him if you want to. . . ." (Tr. 64:24-25.)

He was given wide latitude to cross-examine with a broad view of relevance; plaintiff was confined to a narrow interpretation. (Cf. *supra* 9, item (2), 11(9), 12(2).)

(5) When plaintiff had questions regarding the credibility of a defendant-witness,** the Judge prejudged: "They might not be very relevant to this inquiry" (Tr. 178:4-9). But when plaintiff objected to defense questions of him: the Judge lectured: "When you take the oath and give testimony . . . , the other [side] always has the right to subject your credibility to a determination by this Court, and it's my judgment to determine how far he may probe in that regard" (Tr. 124:23-125:1).

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*Other examples: (a) Plaintiff: "May I simply state that the—" Judge: "No, you may not, You may not. You have a seat." Tr. 149:25-150:2. (b) Plaintiff: "May I please make one other point?" Judge: "No, there's no more I am going to hear from you right now." Tr. 146:10-12.

** It may be suggested that there was no need for plaintiff to cross-examine this witness, the last one, because the Judge was ready to rule and restore the case. Tr. 182:21-25. If this is so, there was no need for a hearing at all, because the Judge repeatedly indicated from the outset that he knew how he was going to rule and regarded the hearing as no more than a pro forma exercise to make a record. *Supra* 8. On that reasoning, plaintiff was entitled to complete the record by pursuing matters raised by the defendants.

(6) Plaintiff had objected to, as irrelevant, extensive questioning (Tr. 120-126) about how much publishing he had done. Aside from credibility, the Judge also overruled the objection because: "You introduced it, unfortunately" (Tr. 121:14-17). Yet he did not see the introduction of matters by the defense as entitling plaintiff to ask questions. For example: "Whether you're a good or bad writer is not in issue in this hearing." Plaintiff: "Well, [defendant] testified to it." Judge: "That doesn't make it [14] an issue in this hearing."* (Tr. 181:23-182:2.)

(7) Repeatedly, the Judge sought to narrowly focus the *hearing*. He said the purpose was "[n]ot [to] try the case" (Tr. 149:9-13). But when plaintiff was cross-examined, his publishing efforts "turn out to be the very subject matter of this *litigation*. Now, that's what the inquiry is about" (Tr. 124:17-19; emphasis added). Plaintiff was thus overruled in his objection "on the ground that . . . the inquiry was about whether I was diligent" (Tr. 124:20-22), a proposition the Judge himself asserted elsewhere: "We're here to determine the extent to which you or your lawyer or both or either did or did not devote attention to this case" (Tr. 111:22-24; see also 61:15-19, 109:11-12).

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*Ironically, the defendant had testified: "Mr. Jackson is not a good writer. The publishing history you have elicited from him today confirms that." Tr. 176:16-18. Hence, the history allowed to be elicited in cross-examination of plaintiff, over his objection to it as irrelevant, was later deemed not an issue when plaintiff sought to cross-examine about the very same matter.

(See also Tr. 95:17-22, where plaintiff also was not permitted to question about an exhibit introduced by the defense.)

The wide cross-examination of plaintiff, really pretrial discovery that had little if anything to do with the Judge's own frequent definition of the subject matter of the hearing (item 7, text, this page), was based on a single passing reference by plaintiff to the importance of publication. Tr. 116:13-16. And it is not clear how credibility is involved here. *Supra* 13.

(8) Finally, although the Judge found relevant defendants' desire to testify that they did not contribute to the delay (Tr. 149:18-24), he did not permit plaintiff to cross-examine a defendant on this point.** (Tr. 178:10-179:22.)

[15] 3. *PREJUDICE AFTER REOPENING OF CASE.* The above makes it unsurprising that the Judge would consider defendants' papers seriously, but not plaintiff's. True, the Judge restored the case, but only because he could find no alternative. *Supra* 7. And the very order granting plaitniff's 60(b) motion ominously directed defendants to move for summary judgment by a fixed date. (Order, April 14, 1978, p. 3; *cf. supra* 6, item 3.)

The Judge just could not conceive that plaintiff had a case or could say anything worthwhile, especially on the law: "you might know a lot about history, but there's a lot else you don't know about lawyers and the law" (Tr. 193:5-7).

Thus there is *not one* reference in the appealed orders to any legal point or authority of plaintiff. Indeed, there is virtually no mention of his extensive papers. *Supra* 2-3; *infra* 31-34, 28-9.

[For following material, see Case 1 Ct.App.Br. at 29-30]

**While the Judge said the matter was "crystal clear" (Tr. 179:9), it was not. For he said it was plaintiff's lawyer who allowed him to believe the case was in good standing (Tr. 178:20-21) and indicated defendants did attempt to publish an article by plaintiff (Tr. 179:13-17) and "were still trying to work out the settlement" (Tr. 146:6-7). Plaintiff vehemently disputed this, and wanted to establish that defendants did contribute to the delay and never tried to publish an article by him, only pretending to try.

APPENDIX 10—Pertinent Parts of Constitution, Statutes and Federal Rules of Civil Procedure

Fifth Amendment, U.S. Constitution:

"No person shall . . . be deprived of life, liberty, or property, without due process of law. . . ."

88 Stat. 1609: PUBLIC LAW 93-512—DEC. 5, 1974—28 USC §455

AN ACT

To improve judicial machinery by amending title 28, United States Code, to broaden and clarify the grounds for judicial disqualification.

Be it enacted ***, That section 455 of title 28, United States Code, is amended to read as follows:

"§455. Disqualification of justice, judge, magistrate, or referee in bankruptcy

"(a) Any *** judge, *** of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

"(b) He shall also disqualify himself in the following circumstances:

"(1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding; ***

"(e) No justice, judge, magistrate, or referee in bankruptcy shall accept from the parties to the proceeding a waiver of any ground for disqualification enumerated in subsection (b). Where the ground for disqualification arises only under subsection (a), waiver may be accepted provided it is preceded by a full disclosure on the record of the basis for disqualification."

28 U.S.C. §1654. Appearance personally or by counsel

In all courts of the United States the parties may plead and conduct their own cases personally or by counsel as, by the rules of such courts, respectively, are permitted to manage and conduct causes therein. As amended May 24, 1949, c. 139, §91, 63 Stat. 103.

Federal Rules of Civil Procedure

Rule 26. General Provisions Governing Discovery

(b) Scope of Discovery. Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

(1) *In General.* Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, . . .

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(3) *Trial Preparation: Materials.* Subject to the provisions of subdivision (b)(4) of this rule, a party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including his attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

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(c) Protective Orders. Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the court in which the action is pending or alternatively, on matters relating to a deposition, the court in the district where the deposition is to be taken may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, ***

Rule 34: Production of Documents

(b) Procedure. The request may, without leave of court, be served upon the plaintiff after commencement of the action and upon any other party with or after service of the summons and complaint upon that party. The request shall set forth the items to be inspected either by individual item or by category, and describe each item and category with reasonable particularity. The request shall specify a reasonable time, place, and manner of making the inspection and performing the related acts.

The party upon whom the request is served shall serve a written response within 30 days after the service of the request, except that a defendant may serve a response within 45 days after service of the summons and complaint upon that defendant. The court may allow a shorter or longer time. The response shall state, with respect to each item or category, that inspection and related activities will be permitted as requested, unless the request is objected to, in which event the reasons for objection shall be stated. If objection is made to part of an item or category, the part shall be specified. The party submitting the request may move for an order under Rule 37(a) with respect to any objection to or other failure to respond to the request or any part thereof, or any failure to permit inspection as requested.

A party who produces documents for inspection shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the request.

Rule 37. Failure to Make or Cooperate in Discovery: Sanctions

(a) Motion for Order Compelling Discovery. A party, upon reasonable notice to other parties and all persons affected thereby, may apply for an order compelling discovery as follows: ***

(2) Motion. If a deponent fails to answer a question propounded or submitted under Rules 30 or 31, or a corporation or other entity fails to make a designation under Rule 30(b)(6) or 31(a), or a party fails to answer an interrogatory submitted under Rule 33, or if a party, in response to a request for inspection submitted under Rule 34, fails to respond that inspection will be permitted as requested or fails to permit inspection as requested, the discovering party may move for an order compelling an answer, or a designation, or an order compelling inspection in accordance with the request. ***

(b) Failure to Comply with Order. ***

(2) *Sanctions by Court in Which Action is Pending.* If a party *** fails to obey an order to provide or permit discovery, including an order made under subdivision (a) of this rule or Rule 35, or if a party fails to obey an order entered under Rule 26(f), the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following: ***

(C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;